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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

PAN AMERICAN WORLD AIRWAYS, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

AND RELATED CROSS AND THIRD PARTY ACTIONS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Can a defendant, or can *only the plaintiff,* in an employment discrimination action appeal under 28 U.S.C. § 1292(a)(1) a District Court order denying a joint motion to enter a consent decree containing injunctive and monetary relief that would settle the entire action? More generally, under what circumstances is denial of a joint motion by plaintiff and defendant for entry of an agreed-upon consent decree to settle a case an appealable order under Section 1292(a)(1)?

In the alternative, can the defendant appeal a District Court order denying a joint motion to enter a consent decree as a "collateral order" under 28 U.S.C. § 1291?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Pan American World Airways, Inc. ("Pan Am")[1] respectfully requests that this Court grant a petition for writ of *certiorari* to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this action on August 8, 1986. The Ninth Circuit found that it lacked jurisdiction over the District Court's order denying a joint motion of Pan Am and the Equal Employment Opportunity Commission ("EEOC") to enter a consent decree that would have settled an employment discrimination action. Pan Am contends that the Ninth Circuit erred in finding that the order was not appealable as a denial of injunctive relief under 28 U.S.C. § 1292(a)(1) and that its decision conflicts with this Court's holding in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) and the reasoning of the

[1] Pursuant to Supreme Court Rule 28.1, Pan Am states that its parent corporation is Pan Am Corporation.

Seventh Circuit applying that case in *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1985) (Posner, J.). In the alternative, Pan Am contends that the order is a collateral order appealable under 28 U.S.C. § 1291 and that this Court should resolve a conflict between the Circuits on this important and recurring question.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Ninth Circuit is reported at 796 F.2d 314 and is reprinted in the Appendix hereto (A 1-7). The opinion of the United States District Court for the Northern District of California is reported at 622 F. Supp. 633 and is reprinted in the Appendix hereto (A 8-34).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 8, 1986. This Court has jurisdiction to review the judgment of the Ninth Circuit under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

28 U.S.C. § 1292(a)(1) (1982) provides in relevant part that "the courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions."

28 U.S.C. § 1291 (1982) provides in relevant part that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT OF THE CASE

A. Background

The Equal Employment Opportunity Commission ("EEOC") filed this action against Pan Am in September, 1981, alleging that Pan Am's policies with respect to employment of persons disqual-

ified by the Federal Aviation Administration's Age 60 Rule, 14 C.F.R. § 121.383(c), from serving as pilots violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-633a.[2] The EEOC specifically claims that Pan Am violated the ADEA by refusing to permit senior pilots to serve as flight engineers past the age of 60 because Pan Am (1) has not permitted pilots to displace (or "bump") flight engineers upon reaching the age of 60 and (2) has not permitted pilots, who have reached age 60, to retain seniority after their retirement from pilot positions for the purpose of bidding on flight engineer vacancies. The EEOC seeks injunctive relief requiring Pan Am to restructure its cockpit employment policies, the reinstatement of 81 pilots retired pursuant to Pan Am's policy, and ancillary relief. The EEOC also seeks back pay and liquidated damages for the former pilots.

Pan Am filed a cross-complaint against the Air Line Pilots Association ("ALPA") and a third party complaint against the Flight Engineers International Association ("FEIA"), the certified representatives of the pilots and flight engineers, seeking injunctive relief in the form of modification of Pan Am's collective bargaining agreements in the event that the District Court granted injunctive relief. The EEOC subsequently added ALPA and FEIA to the complaint as defendants under Federal Rule of Civil Procedure 19(a).

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[2] Pursuant to Supreme Court Rule 21.1(b), Pan Am states that the nominal defendants in this action are the collective bargaining representatives of Pan Am's pilots, the Air Line Pilots Association ("ALPA"), and flight engineers, the Flight Engineers International Association ("FEIA"). The District Court also considered objections to the entry of the consent decree by the National Airlines ("NAL") Chapter FEIA on behalf of former NAL flight engineers, *see infra* note 3, Charles P. Caudle and Vincent Wynne on behalf of former NAL pilots, A.M. Rankin on behalf of a group of airmen furloughed by Pan Am, and 45 former pilots. In the appeal before the Ninth Circuit, the EEOC, the NAL Flight Engineers, and the former pilots filed briefs.

1. First Proposed Consent Decree

This case was set for trial in April, 1983, after a year-and-one-half of extensive discovery. Shortly before trial, Pan Am and the EEOC reached a settlement. Pan Am and the EEOC lodged a consent decree, which would have implemented that settlement, with the District Court and jointly moved for its approval (A 8, 12-13). The decree provided for injunctive relief and also provided the former pilots with an opportunity to be employed as flight engineers. Besides the injunctive relief, Pan Am would have paid equal shares of $250,000.00 to those former pilots who chose not to return to work.

The other two nominal parties to the action, ALPA and FEIA, initially opposed entry of the decree. The District Court granted a number of interested parties leave to intervene for the purpose of commenting on the proposed decree. They included a group of former National Airlines pilots,[3] a group of former National Airlines flight engineers, a group of furloughed Pan Am pilots, and six former Pan Am pilots who had been retired under the challenged policy. The objections of the first three groups focused on the injunctive relief provided by the proposed consent decree.[4] Contending that the decree provided inadequate monetary relief, the six former pilots objected to its entry. Stating that the law was uncertain, the District Court denied the joint motion to enter the

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[3] Pan Am and National Airlines merged in January, 1980. The bidding systems of the two airlines differed in a number of respects. The parties submitted the disputes about the merger of the Pan Am and National seniority lists to arbitration. The arbitrator's award concluded that former National airmen would not possess the same rights as Pan Am airmen (A 8, 12).

[4] The former national pilots and flight engineers strongly argued that Pan Am did *not* violate the ADEA and that the injunctive relief provided by the decree would unjustifiably affect their less senior members by allowing more senior pilots to have priority for flight engineer positions, which could require furlough of their members (A 8, 30-31). The group of Pan Am furloughees claimed that the injunctive relief required payment of pension benefits in violation of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* (1982) (A 8, 31-32).

consent decree. *See* 34 Fair Empl. Prac. Cas. (BNA) 321, 323 (N.D. Cal. 1984).[5]

2. Second Proposed Consent Decree

In July, 1985, Pan Am and the EEOC filed a joint motion to enter a second proposed decree that would resolve this litigation (A 8, 13-14). The second decree, as the first one did, provides for injunctive relief and an opportunity for former pilots who desire to do so to return to Pan Am as flight engineers. The new decree provides for substantially greater monetary relief, which would be apportioned to the claimants somewhat differently than in the first decree. Under the second decree, Pan Am would pay the former pilots $1.5 million; Pan Am would pay $750,000.00 immediately upon entry of the decree, and $375,000.00 on the first and second anniversaries of the entry of the decree. The amount paid to each former pilot would be directly proportional to the length of time since retirement so that those who have been retired the longest would receive the most money.

ALPA signed the new proposed consent decree and FEIA, which initially objected to a few of its terms, later withdrew its objections. The former National airmen and the Pan Am furloughees again opposed the decree on the grounds of the effect that the decree's injunctive relief would have on them. The

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[5] The court noted that this Court had granted *certiorari* in *Airline Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983), *cert. granted sub nom. Trans World Airlines, Inc. v. Thurston*, 465 U.S. 1097 (1984), and might clarify the law. Pan Am filed a notice of appeal with the Ninth Circuit to appeal the District Court order denying the joint motion to enter the consent decree. In January, 1985, this Court decided *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S. Ct. 613 (1985), which affirmed in part and reversed in part the Second Circuit's decision. In light of that decision, Pan Am requested the Ninth Circuit to remand the case to the District Court for the limited purpose of entering the proposed consent decree or a modification thereof. After the EEOC and Pan Am submitted a new consent decree to the District Court, Pan Am dismissed the appeal.

former Pan Am pilots[6] again objected to the decree primarily on the ground that, in light of this Court's decisions in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S. Ct. 613 (1985) and *Western Air Lines, Inc. v. Criswell*, 105 S. Ct. 2743 (1985), it provided them with inadequate monetary relief.[7]

B. District Court Decision

After a hearing, the District Court issued an opinion on October 22, 1985 refusing to enter the proposed consent decree. Even though this is an action brought by a federal agency rather than a class of private parties, the Court applied the standard of review required by Federal Rule of Civil Procedure 23 and rigorously scrutinized the fairness of the proposed decree. Utilizing that standard, the District Court held that the $1.5 million award to the former Pan Am pilots was inadequate and refused to enter the decree proposed by the parties (A 8). The District Court rejected the argument that, by virtue of Section 7(c)(1) of the ADEA, 29 U.S.C. § 626(c)(1), which terminates the right of any person to bring an ADEA action once the EEOC has commenced an action, Congress conferred broad discretion upon the agency to determine the appropriate amount of monetary relief to be provided by a settlement.

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[6] Although only six opposed the first decree, 45 of the 81 former pilots ultimately opposed the entry of the second decree (A 8).

[7] Despite the former pilot's claims, both *Thurston* and *Criswell* are readily distinguishable from this case. TWA allowed pilots to displace flight engineers in *every* other instance except those who had reached age 60. *See Thurston*, 105 S. Ct. at 621. Pan Am did not. Similarly, in *Criswell*, Western's defense to its policy of mandatory retirement of *all* cockpit crew members, including flight engineers, who reached age 60, was that age itself was a " 'bona fide occupational qualification' reasonably necessary to the safe operation of the airline." *Criswell*, 105 S. Ct. at 2747. Western never asserted the safety defense that Pan Am would present to a jury at trial in this case.

C. Court of Appeals Decision

Pan Am appealed the District Court's refusal to enter the consent decree jointly proposed by the EEOC and Pan Am.[8] Pan Am asserted that the Court of Appeals had jurisdiction over the appeal of the District Court order under 28 U.S.C. § 1292(a)(1) as interpreted by this Court in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), and under 28 U.S.C. § 1291 as a collateral order. The Ninth Circuit in a *per curiam* opinion distinguished *Carson* and held that it lacked jurisdiction over the appeal under Section 1292(a)(1). The court also held that, in light of *Carson*, its previous decision holding that a defendant could appeal the District Court's refusal to enter a consent decree as a collateral order under 28 U.S.C. § 1291 was no longer good law. The court dismissed the appeal for lack of jurisdiction and did not reach the merits of Pan Am's appeal (A 1).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

A. This Case Presents Significant and Important Issues Concerning the Appealability Under 28 U.S.C. § 1292(a)(1) of Orders Refusing to Enter Consent Decrees Jointly Sought By Plaintiff and Defendant.

In *Carson v. American Brands, Inc.*, 450 U.S. 79, 80 (1981), this Court decided the question "whether an interlocutory order of the District Court denying a joint motion of the parties to enter

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[8] On appeal, Pan Am contended that the EEOC's action against Pan Am is not a class action under Federal Rule of Civil Procedure 23 and that the District Court should have deferred to the EEOC's exercise of the discretion delegated by Congress in the ADEA to settle this action. The only two courts to have addressed this precise question have adopted that position. *EEOC v. Consolidated Edison Co.*, 557 F. Supp. 468 (S.D.N.Y. 1983); *EEOC v. Eastern Air Lines, Inc.*, 97 F.R.D. 646 (S.D.Fla. 1983), *appeal dismissed*, 736 F.2d 635 (11th Cir. 1984). In the alternative, Pan Am contended that the District Court erred in its evaluation of the strength of the EEOC's case on the merits of its ADEA claims and thus in its evaluation of the fairness of the $1.5 million monetary award.

a consent decree containing injunctive relief is an appealable order," and held that such an order is appealable under 28 U.S.C. § 1292(a)(1). In this case, by holding that *Carson* applies only when *plaintiffs* appeal from denial of entry of a jointly sought consent decree and by limiting *Carson* to its specific facts, the Ninth Circuit's *per curiam* opinion drastically limits the scope of that decision. As a direct result, only plaintiffs will be allowed to appeal from joint motions to settle cases with consent decrees in the Ninth Circuit. The Ninth Circuit's decision therefore conflicts with the holding of this Court in *Carson* and the reasoning of the Seventh Circuit in *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1985).

In *Carson*, a class of black employees alleged that the employer and the collective bargaining representatives discriminated against them in hiring, promotion, transfer, and training opportunities in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* and sought declaratory and injunctive relief and monetary damages. After extensive discovery, the parties negotiated a settlement and jointly moved the District Court to enter a consent decree. The District Court denied the joint motion. *Carson v. American Brands, Inc.*, 446 F. Supp. 780 (E.D. Va. 1977). On appeal, the Court of Appeals for the Fourth Circuit, sitting *en banc*, dismissed the appeal for want of jurisdiction. 606 F.2d 420 (4th Cir. 1979) (en banc). The Fourth Circuit held that the District Court's refusal to enter the consent decree was neither an interlocutory order refusing an injunction under 28 U.S.C. § 1292(a)(1) or a collateral order under 28 U.S.C. § 1291.

This Court noted the conflict between decisions of the Courts of Appeals on the issue of the appealability of a District Court's order denying a motion to enter a consent decree and granted *certiorari*. *See Carson*, 450 U.S. at 82-83 n.6.[9] Resolving the

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[9] One case cited by the Court in illustrating that conflict was In re *International House of Pancakes Franchise Litigation*, 487 F.2d 303 (8th Cir. 1973). In that case, the Court of Appeals for the Eighth Circuit, without a discussion of the question, asserted jurisdiction over the *defendant's* appeal of the District Court's refusal to enter a consent

conflict in favor of appellate jurisdiction, this Court reversed the Fourth Circuit's decision and held that the order was appealable under Section 1292(a)(1).[10]

Perhaps the most significant reason for the Court's holding in *Carson* was the plain fact that, absent immediate appeal, the litigants would be deprived of the opportunity to settle the case on the mutually agreed upon terms. *See Carson*, 450 U.S. at 86. The District Court's order therefore undermined the "strong preference for encouraging voluntary settlement of employment discrimination claims." *Id.* at 88 n.14.

In reaching the conclusion that the District Court's order was appealable, the Court recognized the value of consent decrees to the parties to an action:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. *The parties waive the right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation.* Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties give up something they might have won had they proceeded with the litigation.

Id. at 86-87 (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971); emphasis added).

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decree proposed by the parties. The Ninth Circuit's decision in this case squarely conflicts with the Eighth Circuit's decision in *International House of Pancakes*. Assuming that the issue was not resolved in *Carson*, this Court could address the conflict on this recurring question at this time. *See* Supreme Court Rule 17.1(a).

[10] Holding that the order was appealable under § 1292(a)(1), the Court found it unnecessary to decide whether the order was also appealable under 28 U.S.C. § 1291. *See* 450 U.S. at 83 n.7; *see also* discussion *infra* at pp. 18-21.

1. The Ninth Circuit's Decision Conflicts with this Court's Holding in *Carson v. American Brands*, with the Eighth Circuit's Decision in *International House of Pancakes Litigation*, and with the reasoning of the Seventh Circuit in *Donovan v. Robbins*.

As the plaintiffs did in *Carson*, Pan Am sought to appeal the District Court's denial of a joint motion to approve a proposed consent decree containing injunctive and monetary relief that would have settled an employment discrimination action. Nonetheless, the Ninth Circuit distinguished *Carson* and held that it lacked jurisdiction over the appeal. The court did so on the grounds that, in *Carson*, the *plaintiffs* sought to appeal the District Court's order while, here, *Pan Am, the defendant*, sought to appeal the District Court's order. The Ninth Circuit's reliance on that distinction conflicts with this Court's analysis in *Carson*.

The reasoning of *Carson* applies squarely to this case. *First*, the District Court's order truly denies Pan Am injunctive relief including (1) the settlement of this case on the terms set forth in the consent decree, thereby relieving it of the threat of ADEA liability for its cockpit crew policy, *and* (2) amending its collective bargaining agreements so that it does not risk liability for settling the case. The settlement of this case on the terms agreed upon by the parties is a form of injunctive relief that flows directly to Pan Am—relief denied as a result of the District Court's order. In addition, without modification of the collective bargaining agreements, Pan Am would risk actions by the bargaining representatives for breach of the collective bargaining agreements. *See W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757 (1983) (holding that employee may recover under collective bargaining agreement for injury caused by company's unilateral settlement of employment discrimination action with EEOC). *Second*, Pan Am, like the plaintiffs in *Carson*, might suffer "serious, perhaps irreparable, consequence" unless allowed to appeal the District Court's denial of the joint motion to enter the consent decree. Because Pan Am (and the EEOC) have been denied a settlement upon the terms to which they have agreed, they each may have to bear "the time, expense and inevitable risk of litigation" that might well be

avoided through settlement; at the same time, Pan Am will be denied the opportunity and "right to compromise [the] dispute on mutually agreeable terms." *Carson*, 450 U.S. at 88 (footnote omitted). Finally, for the reasons set forth in *Carson*, *see* 450 U.S. at 88 & n.14, the District Court's order can only effectively be challenged by immediate appeal.

The "serious, perhaps irreparable, consequence" that Pan Am will suffer if it is denied immediate appeal of the District Court order is exemplified by the tortuous procedural history of *Santana v. Collazo*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984). Plaintiffs in that action had negotiated *three* proposed consent decrees, all rejected by the District Court. On each occasion, the Court of Appeals for the First Circuit, without the guidance of this Court's decision in *Carson*, dismissed the appeals of the orders for lack of jurisdiction. The case ultimately proceeded to trial. On appeal after adjudication of the merits at trial, the First Circuit found it impossible to evaluate the terms of the consent decrees:

> *In this case, defendants have withdrawn their consent to the proposed settlement.* Moreover, having the evidence presented at the trial before us, and the benefit of the district court's assessment of that evidence, it would be difficult for us now to "judge the fairness of [the] proposed compromise by weighing the plaintiff[s'] likelihood of a success on the merits against the amount and form of the relief offered in the settlement." . . . *Finally, while public policy favors the enforcement of an amicable settlement of litigation without trial . . . , it is now too late to avoid the time and expense of trial.* Rather than seeking to return to the situation as it existed before the parties and the court invested a year and a half in a trial, we think it wiser to return to the merits of the issues presented to and reviewed by the district court and which formed the basis of its detailed findings.

714 F.2d at 1175 (citations omitted; emphasis added).[11]

a. The District Court Order Denied Pan Am Injunctive Relief.

The Ninth Circuit first distinguished *Carson* on the ground that Pan Am, unlike the plaintiffs in *Carson*, had not been denied an injunction. The Ninth Circuit stated that *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976)[12] held that "jurisdiction lies under Section 1292(a)(1) only if the party *taking the appeal* was denied injunctive relief." (A 1, 4) (emphasis in original).[13] *Liberty Mutual*, which held that an interlocutory order was not appealable under 28 U.S.C. § 1291, is readily distinguishable from this case. The District Court in *Liberty Mutual* had granted a motion for partial summary judgment for the plaintiff on liability *but had not granted any relief. See Liberty Mutual*, 424 U.S. at 742.[14] Because the issue of relief was not before the Court,

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[11] *See* 16 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 3924, at 48 (Supp. 1986) (stating that *Santana v. Collazo* "graphically illustrate[s]" the risk of losing a settlement because of the appellate court's refusal to exercise jurisdiction over the appeal of a District Court order refusing to enter a consent decree).

[12] This Court in *Carson* did not mention *Liberty Mutual* as a limitation on its holding.

[13] The Ninth Circuit apparently was referring to the following dicta in *Liberty Mutual*:

> [i]f the District Court had granted injunctive relief but had not ruled on respondent's other request for relief, this interlocutory order would have been appealable under § 1292(a)(1). But . . . the court did not issue an injunction. It might be argued that the order of the District Court, insofar as it failed to include the injunctive relief requested by respondents, is an interlocutory order refusing an injunction within the meaning of § 1292(a)(1). But even if this would have allowed *respondents* to then obtain review in the Court of Appeals, there was no denial of any injunction sought by *petitioner* and it could not avail itself of that grant of jurisdiction.

424 U.S. at 744-45 (emphasis in original).

[14] Plaintiffs "received none of the relief which they expressly prayed for . . . . They requested an injunction, but did not get one; they re-

the exercise of appellate jurisdiction could *not* have finally resolved the case; even if the Court had exercised jurisdiction, piecemeal appeals were a reasonable possibility, if not a probability. Given these facts, this Court held that the defendant could not appeal a partial summary judgment order on the issue of liability.

In this case, by refusing to enter the decree, the District Court in fact denied the injunctive relief sought by *both* Pan Am and the EEOC. *See Carson v. American Brands, Inc.*, 606 F.2d 420, 425, 429 (4th Cir. 1979) (en banc) (Winter, J., dissenting) (distinguishing *Liberty Mutual* on similar grounds), *rev'd*, *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981). Moreover, Pan Am is denied the injunctive relief provided by the consent decree: an end to this litigation and a shield to future ADEA liability for its former cockpit crew policy. Finally, the plain fact that Pan Am will *never* be able to appeal the District Court order, if denied this opportunity, outweighs the policy against piecemeal review. By reviewing the District Court order, the Ninth Circuit could have finally resolved this action.

The Ninth Circuit also rejected Pan Am's argument that it was denied injunctive relief because the proposed consent decree would have amended the collective bargaining agreements with ALPA and FEIA in accordance with the injunctive relief granted to the EEOC, on the grounds that it was only " 'secondary' injunctive relief." (A 1, 4-5). However, such relief is necessary so that Pan Am may assure itself that it will not be liable if it complies with the consent decree. *See W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757 (1983). Accordingly, Pan Am was denied not one, but two, forms of injunctive relief.

b. The District Court Order Will Cause Pan Am "Serious, Perhaps Irreparable, Consequence."

The Ninth Circuit also found that Pan Am failed to establish the "serious, perhaps irreparable, consequence" required by *Carson*. The court distinguished *Carson* on the ground that, absent a

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quested damages, but were not awarded any; they requested attorneys' fees, but received none." 424 U.S. at 742.

showing of actual past discrimination, the District Court in that case refused to approve *any* remedial relief, thereby forcing the case to trial. In this case, the Ninth Circuit stated that the District Court's "opinion focuses primarily on the inadequacy of the monetary settlement." (A 1, 6) (citation omitted).

Even though the District Court's primary objection was with the $1.5 million monetary award, that should not foreclose Pan Am from appealing the order, which effectively deprives it of injunctive relief. In *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1985) (Posner, J.), the Court of Appeals for the Seventh Circuit held that it had jurisdiction under Section 1292(a)(1) over the appeal of a District Court order that refused to approve a consent decree containing both injunctive and monetary relief on the basis that the monetary award was insufficient.[15] As in *Donovan v. Robbins*, the District Court's objection to the monetary relief effectively precludes entry of the decree that provides for extensive injunctive relief. The Ninth Circuit's reasoning therefore conflicts with that of the Seventh Circuit. *See* Supreme Court Rule 17.1(a).

The reasoning of the District Court does not change the fact that it denied Pan Am injunctive relief that will result in "serious, perhaps irreparable, consequence." Pan Am will be forever foreclosed from settling on the terms provided for in the consent decree and forced to trial. Moreover, the fact that Pan Am might offer more money does not change the fact that *this* settlement is forever lost. In *Carson*, the defendant conceivably could have conceded "actual past discrimination" and settled the case. This case is no different in principle.

c. The District Court Order Can Only Be Effectively Challenged By Immediate Appeal.

Having concluded that Pan Am had not been denied an injunction or established "serious, perhaps irreparable, conse-

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[15] *See also Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982) (holding that joint appeal of District Court order refusing to enter a consent decree in a Title VII action was appealable even though the refusal was based on the monetary award to the class representatives).

quence," the Ninth Circuit did not decide whether the District Court order was one that Pan Am could only effectively challenge by immediate appeal (A 1, 6 n.6). As set forth in *Carson*, that requirement is readily satisfied. Without immediate appeal, Pan Am will be forever denied the right effectively to challenge the District Court's order. After trial, an appellate court, as a practical matter (as exemplified by *Santana v. Collazo*), cannot effectively review a settlement agreement reached long ago before the facts were adduced at trial and the uncertain legal questions answered. Accordingly, absent immediate appeal, Pan Am will lose the opportunity to settle on the mutually agreed upon terms in the consent decree.

2. The Ninth Circuit's Holding Runs Afoul of the Strong Policy Favoring Voluntary Settlement of Employment Discrimination Actions.

Both Congress and the courts have endorsed the overriding policy favoring voluntary settlement of employment discrimination actions.[16] *See, e.g., Local No. 93, International Association of Firefighters v. City of Cleveland,* 106 S. Ct. 3063, 3072-73 (1986) ("[W]e have on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII."; citing cases); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).[17] To facilitate voluntary compliance, the ADEA requires the EEOC, upon receipt of a charge that an employer or labor organization has violated the ADEA, to "promptly notify all persons named in such charge as prospective defendants in the action and *shall*

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[16] For that reason, consent decrees are the rule rather than the exception in employment discrimination actions brought by the EEOC. In fiscal year 1983, the EEOC's district offices entered consent decrees in twice as many cases (94) as it took to trial (47). EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 18TH ANNUAL REPORT, 31 (1985).

[17] *See also* 29 C.F.R. § 1608.1(b) (1985) (In enacting Title VII, "Congress strongly encouraged employers . . . to act on a voluntary basis to modify employment practices in systems which constituted barriers to equal employment opportunity.").

promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(d) (emphasis added); *see* 29 C.F.R. § 1626.12 (1985).[18]

In *Local No. 93 v. City of Cleveland*, 106 S. Ct. at 3073, this Court reiterated the basis for its holding in *Carson*: "a District Court's order denying entry of a consent decree is appealable under 28 U.S.C. § 1292(a)(1) *because such an order undermines Congress' 'strong preference for encouraging voluntary settlement of employment discrimination claims.'* " (citation omitted; emphasis added). The Ninth Circuit's decision undercuts the policy favoring voluntary settlement of employment discrimination actions. As set forth *supra*, only through immediate appeal of the District Court's refusal to enter a consent decree can the parties hope to settle an action on those terms. Once the district court disapproves a proposed decree, there is no alternative but to change the terms of the decree or proceed to trial—even if the district court commits grievous error in refusing to enter the proposed decree. That result encourages *litigation*, not *settlement*, of matters that could, and for the benefit of all involved, should be resolved through voluntary compliance. By forcing the litigation of claims that have been settled to the satisfaction of the parties, both private and judicial resources are wasted.

3. Conclusion

The reasons offered by the Ninth Circuit for distinguishing *Carson* are unpersuasive. The balance of advantages of asserting jurisdiction against the costs of piecemeal appeals, weighs decidedly in favor of permitting appeals by the defendant, as well as the plaintiff, when a District Court refuses to enter a consent decree

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[18] *See also* House Report No. 805, 90th Cong., 1st Sess. (1967), *reprinted* in 1967 U.S. CODE CONG. & AD. NEWS 2213, 2218 (stating that the EEOC's enforcement responsibility is intended to "be initially and exhaustively directed through informal methods of conciliation, conference, and persuasion and formal methods applied only in the ultimate sense").

containing both injunctive and monetary relief.[19] *See Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (Among "the considerations that always compete in the question of appealability, the most important . . . are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."; citations omitted). Moreover, the Ninth Circuit's holding creates an anomalous and inequitable situation unprecedented in any other area of the law: *only the plaintiff in an employment discrimination action may appeal a District Court order disapproving a consent decree proposed by both the plaintiff and defendant.* The parties besides the plaintiff with vital interests at stake in immediate resolution of the dispute, including the employer and labor organizations, cannot appeal the same order. Employers and labor organizations—the most likely defendants in an employment discrimination action—are left no recourse if a District Court disapproves the proposed settlement. Plaintiffs may appeal but also may

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[19] As one commentator has observed:

> [t]o mitigate the harshness and occasional absurdity of inflexible insistence on finality in all situations, Congress and the courts have developed certain exceptions to the finality requirement. Moreover, because the final judgment rule and its preexisting exceptions have not always been sufficient to assure fairness to appellants, the courts have at times allowed appeals of orders that neither fit within the terms of any of the established exceptions nor meet the technical requirements of finality. The Courts have applied a pragmatic approach to appealability in these situations. *In the words of the Supreme Court, among "the considerations that always compete in the question of appealability, the most important . . . are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."* This balancing of the competing needs for judicial economy represents the Court's recognition that "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the just, speedy, and inexpensive determination of every action.' " or, as the Court has also phrased it, "the requirement of finality is to be given a 'practical rather than a technical construction.' "

Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 90-91 (1975) (emphasis added).

employ the District Court's order as a lever in further settlement negotiations. Such a bargaining chip greatly favors the plaintiff at the expense of the employer, the labor organization, and others, including employees, affected by a proposed settlement.

The Court of Appeals for the Ninth Circuit has erroneously "decided an important question of federal law which has not been, but should be, settled by this Court." Supreme Court Rule 17.1(c). This Court therefore should grant the petition for writ of *certiorari*.

B. This Case Presents a Significant and Important Issue Concerning the Appealability Under 28 U.S.C. § 1291 of Orders Refusing to Enter Consent Decrees On Which There is a Clear Conflict Among the Circuits.

Pan Am also invoked appellate jurisdiction over the District Court's order as a "collateral order" under 28 U.S.C. § 1291. Section 1291 provides that the Courts of Appeals has jurisdiction "of appeals from all final decisions of the District Courts of the United States." In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), this Court created a route for appeal of important District Court orders that do not constitute a final judgment but

> which finally determine claims of *right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.* The Court has long given this provision of the statute this practical rather than a technical construction.

(citing *Bank of Columbia v. Sweeney*, 26 U.S. (1 Pet.) 567, 569 (1828); *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 414 (1926); *Cobbledick v. United States*, 309 U.S. 323, 328 (1940); emphasis added). This Court's recent decisions have reaffirmed the formulation of the collateral order doctrine set forth in *Cohen*. *See, e.g., Richardson-Merrell, Inc. v. Koller*, 105 S. Ct. 2757 (1985); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).

In *Norman v. McKee*, 431 F.2d 769 (9th Cir. 1970), *cert. denied sub nom. Isi v. Myers*, 401 U.S. 912 (1971), the Court of Appeals for the Ninth Circuit applied *Cohen* and held that a defendant could appeal the District Court's refusal to enter a proposed consent decree. As the court reasoned,

> [i]t seems clear in this case that the order disapproving the proposed settlement is a collateral order. The proposed settlement is independent of the merits of the case. It would not merge in final judgment. Disapproval of the settlement is not a step toward final disposition and is not in any sense an ingredient of the cause of action. *In itself, the district judge's order is final on the question whether the proposed settlement should be given judicial approval.*

Id. at 773 (emphasis added). The court then balanced " 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice for delay on the other.' " *Id.* at 774 (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)). After considering the complex questions raised in the action and the cost of a lengthy and expensive trial, the court concluded that the costs of piecemeal review were minimal and outweighed by the danger of denying justice by delay. *Norman v. McKee*, 431 F.2d at 774.

The Court of Appeals for the Second Circuit reached a result contrary to *Norman v. McKee* in *Seigal v. Merrick*, 590 F.2d 35 (2d Cir. 1978). Reading this Court's decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978),[20] as suggesting that the collateral order doctrine be read narrowly, the Second Circuit held that an order disapproving a settlement was not appealable as a collateral order. The court reasoned that "[s]uch an order is based, in part, upon an assessment of the merit of the positions of the respective parties, and permits the parties to proceed with the

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[20] *In Coopers & Lybrand v. Livesay*, this Court held that a District Court order denying a motion for class certification was not appealable as a collateral order. As this Court recognized, "an order denying class certification is subject to effective review after final judgment." 437 U.S. at 469 (citation omitted).

litigation or to propose a different settlement." *Seigal v. Merrick*, 590 F.2d at 37. In holding that the District Court's order was not appealable under Section 1291, the Second Circuit recognized that its decision conflicted with the Ninth Circuit's decision in *Norman v. McKee*. *See Seigal v. Merrick*, 590 F.2d at 39.

In *Carson v. American Brands, Inc.*, this Court noted the conflict between *Norman v. McKee* and *Seigal v. Merrick*. *Carson*, 450 U.S. at 82-83 n.6. However, having decided that the District Court order denying the joint motion to enter the consent decree *was* appealable under Section 1292(a)(1), the Court found it unnecessary to, and expressly did not, decide whether the order was appealable under Section 1291. *See* 450 U.S. at 83 n.7. Accordingly, the Court did not resolve the conflict between *Norman* and *Seigal*. If this Court concludes that Pan Am cannot appeal the District Court's order under Section 1292(a)(1), then it should grant *certiorari* in order to resolve the conflict between the Circuits on this recurring question of federal law.

For the reasons set forth in *Norman v. McKee*, the District Court's order should be treated as a collateral order and appealable under Section 1291. The issue whether the proposed consent decree should be approved "finally determine[s] claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. As the Second Circuit recognized in *Seigal*, the parties naturally consider the merits and risks of litigation in deciding whether to settle an action. That alone, however, does not mean that the rejection of the decree by the District Court is not a collateral order. After a trial of the merits, the propriety of the terms of the proposed decree cannot properly be evaluated in light of the litigation risks. After trial, the risks sought to be avoided have come to pass, at least for one of the parties, and the victorious litigant quite rationally will not compromise on the terms of the previously agreed-upon consent decree. Thus, the ability to settle on those terms is forever lost if a party is not allowed to appeal an order disapproving the proposed decree. Finally, the fact that the order cannot be appealed and that the District Court's refusal to

enter a proposed decree is contrary to the policy favoring voluntary settlement of employment discrimination actions, vastly outweigh any inconvenience caused by piecemeal review. *See supra* pp. 15-17.

Here, the Ninth Circuit acknowledged that *Norman v. McKee* is no different from this case (A 1, 6-7 n.7). The court, however, held that *Norman* was no longer "good law" in light of this Court's decision in *Carson*. In the words of the Ninth Circuit, "*Carson* was intended to provide a definitive basis and standard for such interlocutory appeals, and thus overrules *Norman v. McKee*'s reliance on Section 1291." (A 7 n.7). However, Sections 1291 and 1292(a)(1) are independent bases for appellate jurisdiction. For that reason, this Court has treated jurisdiction under Section 1292(a)(1) and Section 1291 separately and, even when finding that appellate jurisdiction was lacking over a certain category of appeals under one statute, it has evaluated the propriety of jurisdiction under the other statute. *See Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) (holding that the denial of a motion for class certification was not appealable under Section 1292(a)(1) by petitioner seeking injunctive relief); *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (holding that denial of motion for class certification was not appealable as a collateral order under Section 1291). Instead of treating the statutes separately, the Ninth Circuit read a holding into *Carson* that simply is not there. Because Section 1291 is an independent basis for appellate jurisdiction, the Ninth Circuit should have squarely addressed the question whether jurisdiction was appropriate under that section.

This Court should resolve this conflict between the Circuits on a significant and important issue of federal law that will continue to affect the settlement of numerous employment discrimination actions. *See* Supreme Court Rule 17.1(a).

CONCLUSION

For the foregoing reasons, petitioner Pan American World Airways, Inc. respectfully requests that this Court grant the petition for writ of *certiorari*.

Dated: September 26, 1986.

Respectfully submitted,

HELLER, EHRMAN, WHITE & MCAULIFFE

By ROBERT S. VENNING
Counsel for Petitioner

Appendix A

For Publication

United States Court of Appeals
for the Ninth Circuit

No. 85-2840
DC No. C-81-3636 RFP

Equal Employment Opportunity Commission
Plaintiff-Appellee,

v.

Pan American World Airways, Inc.,
Defendant-Appellant.

And Related Cross and Third Party Actions

Appeal from the United States District Court
for the Northern District of California
Robert F. Peckham, District Judge, Presiding
Argued and Submitted July 17, 1986
San Francisco, California

OPINION

[Filed Aug. 8, 1986]

Before: Choy, Hug and Wiggins, Circuit Judges
Per Curiam.

Pan American World Airways, Inc. (Pan Am) appeals from a district court order disapproving a proposed consent decree between Pan Am and the Equal Employment Opportunity Commission (EEOC) that would have settled an EEOC suit claiming age discrimination in Pan Am's employment policies involving pilots and flight engineers. We conclude that we have no jurisdiction and dismiss.

FACTS AND PROCEEDINGS BELOW

EEOC filed an action against Pan Am alleging violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 626(b), by Pan Am's refusal to employ persons between the ages of 60 and 70 as flight engineers.[1] Pan Am filed additional pleadings bringing the two unions involved, the Airline Pilots Association (ALPA) and the Flight Engineers International Association (FEIA), into the action so as to bind them in case the district court decree required modification of Pan Am's collective bargaining agreements with them.

In May 1983, Pan Am and the EEOC reached a settlement agreement under which Pan Am would allow flight engineers to work until age seventy and would allow pilots who had been forcibly retired to return and retrain as flight engineers if they wished.[2] Pan Am also agreed to pay those forcibly-retired employees who elected not to return equal shares of a total of $250,000 single payment. The settlement also provided a procedure allowing pilots reaching the age of sixty in the future to "bump" more junior flight engineers.

This settlement was agreed to by Pan Am and the EEOC and, after some modification, by the ALPA and the FEIA. The settlement was opposed by six individual claimants and the National Airline Chapter of FEIA (NAL-FEIA).[3] The district

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[1] Because we conclude we have no jurisdiction over the appeal, we need not detail the specifics of the Pan Am employment policies and the EEOC's objections to them. The merits of the case generally revolve around the permissibility of forbidding pilots who reach the (FAA-mandated) retirement age of 60 to "bump" flight engineers with less seniority and assume their jobs, which are not age-regulated by the FAA.

[2] This continued employment or reemployment was subject to the employee meeting the physical and skills requirement of the job.

[3] The NAL-FEIA is an independent unit within the FEIA that exists as a result of the merger between Pan Am and National Airlines (NAL). The employment structures of pilots and flight engineers for the two airlines differed markedly, and employees of the present Pan Am are treated differently in some respects depending on which airline

court (Ingram, J.) refused to enter this proposed consent decree on the ground that the law in this area of the ADEA was uncertain and noted that the Supreme Court had granted certiorari in a case on a similar issue. *E.E.O.C. v. Pan American World Airways*, 34 Fair Emp. Prac. Cas. (BNA) 321 (N.D. Cal. 1984). The court also denied Pan Am's motion for reconsideration of the refusal.

Pan Am appealed the denial of its motion to enter the proposed consent decree but sought and received a limited remand after the Supreme Court's decision in *Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 613 (1985). Pan Am and the EEOC then proposed a new consent decree, increasing the payment total to $1.5 million, spreading the payment over three years without interest, broadening the coverage of the payments to include those who elect to return to work, and varying the amount each claimant receives according to the length of time since the individual's forced retirement. Pan Am, the EEOC, and the ALPA agreed to the new terms, and the FEIA offered no objections. The NAL-FEIA again objected, as did 45 of the 81 affected claimants.

In a thorough memorandum, the district court (Peckham, J.) disapproved the proposed revised consent decree. *See E.E.O.C. v. Pan American World Airways, Inc.*, 622 F. Supp. 633, 648-49 (N.D. Cal. 1985). Pan Am timely appeals.

APPELLATE JURISDICTION

Before we may reach the merits of this appeal, we must determine whether we have jurisdiction. *See Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1377 (9th Cir. 1985).

In its opening brief, Pan Am asserts that we have jurisdiction under 28 U.S.C. § 1292(a) (1982) because the district court

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they worked for before the merger. The NAL-FEIA has therefore continued to exist to protect the distinct interests of the former NAL employees.

order denies injunctive relief.[4] The controlling case on this issue is *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981). In *Carson*, the Supreme Court effectively set forth three requirements for determining whether an interlocutory order denying a joint motion for entry of a consent decree is an appealable order pursuant to section 1292(a)(1). First, the interlocutory order must have the practical effect of denying an injunction. *Id.* at 83-84. Second, the order must have "serious, perhaps irreparable, consequence." *Id.* at 84. Finally, the order must be one that can be "effectively challenged" only by immediate appeal. *Id.*

Pan Am fails to meet the "denial of injunction" requirement of *Carson*. Although the disapproved consent decree clearly involved injunctive relief (primarily the modification of Pan Am's cockpit staffing policies), that injunctive relief was sought by the *appellee* EEOC, not by *appellant* Pan Am. *See Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 744-45 (1976) (holding that jurisdiction lies under section 1292(a)(1) only if the party *taking the appeal* was denied injunctive relief).

Pan Am argues that it too was denied injunctive relief in that part of the proposed consent decree would have amended the current collective bargaining agreements with ALPA and FEIA in accordance with the relief granted to the EEOC. Without the "injunctive relief" of that amendment, Pan Am argues, it cannot change its present policies to satisfy the EEOC without risking lawsuits by the unions charging breach of the unions' contracts. *See, e.g., W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983) (holding that employee may recover under collective bargaining agreement for injury caused by company's unilateral settlement of civil rights case with EEOC). Pan Am joined ALPA and FEIA for the very purpose of binding them to the judgment in the case, and the disapproval of the consent decree,

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[4] 28 U.S.C. § 1292(a) (1982) provides in relevant part:

> [T]he court of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . .

Pan Am argues, prevents that. In the meantime, Pan Am asserts, it faces a real risk of suit if it breaches the unions' contracts unilaterally and mounting back pay claims if it doesn't.

We note, however, that the amendments to the collective bargaining agreement sought by Pan Am are a kind of "secondary" injunctive relief, made necessary only by the relief granted to the EEOC and *against* Pan Am. Pan Am seeks no modification of the collective bargaining agreement beyond that specifically required by the EEOC's suit. Because the consent decree has not been approved, the EEOC has not yet been granted any injunctive relief, and Pan Am does not need any injunctive relief against the unions.

Moreover, Pan Am's dilemma is at least partly speculative. Even if the denial of the current consent decree stands, the eventual revised decree or final judgment after trial might not require modifications in the collective bargaining agreement, the unions might not object to any changes that were made, or a successor collective bargaining agreement might be in effect that already takes into account the changes.[5] We thus conclude that disapproval of the consent decree in this case does not have the practical effect of denying Pan Am injunctive relief. *See Carson*, 450 U.S. at 83-84.

Pan Am also fails to meet the requirement of "serious, perhaps irreparable, injury." *See Carson*, 450 U.S. at 84. Pan Am claims that it, like the petitioner in *Carson* is being denied the right to settle the suit on mutually agreeable terms. In *Carson*, however, the disapproval of the consent decree effectively forced the parties to trial. The district court in *Carson* refused to approve *any* remedial relief without a showing of actual past discrimination, a charge that the defendants continued to deny, and even then the court would grant only to actual victims of that past discrimination. *See Carson*, 450 U.S. at 87 n.12. This refusal completely foreclosed any further settlement negotiations short of outright

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[5] We note, for example, that Pan Am by its own admission changed its cockpit staffing policy in 1983, moving in the general direction of the policy urged by the EEOC, and the airline has apparently had no trouble with its unions as a result.

admission of discrimination by the defendants and complete restructuring of the class relief. *See id.*

In the present case, the district court's ground for disapproving the decree is not nearly so broad. The district court opinion focuses primarily on the inadequacy of the monetary settlement, and also mentions the strength of Pan Am's case and Pan Am's financial position. *See* 622 F. Supp. at 641-46. The opinion does not attack the underlying premise of the settlement (that Pan Am's previous policies violated the ADEA) nor the injunctive relief proposed by the parties (the modified policies and their binding force on the unions). The disapproval in no way inhibits further negotiations between the EEOC and Pan Am to meet the concerns raised. As a result, Pan Am is not being denied the right to settle the case on *any* mutually agreeable terms, as were the defendants in *Carson*; Pan Am is merely being denied the right to settle the case on the *particular* terms of the current proposed consent decree, which the district court found unreasonable. In light of this, Pan Am has not asserted a "serious, perhaps irreparable, harm" to itself from the disapproval of the decree.[6]

In summary, Pan Am fails to meet the requirements for interlocutory appeal set forth in *Carson*,[7] and its appeal is DISMISSED for lack of jurisdiction.

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[6] Because Pan Am's appeal fails the first two requirements of the *Carson* test, we do not consider whether it meets the third requirement, that the order be one that can be effectively challenged only on immediate appeal.

[7] Pan Am also asserts jurisdiction pursuant to 28 U.S.C. § 1291, relying on the *Cohen* doctrine in general and *Norman v. McKee*, 431 F.2d 769, 772-74 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971), in particular. *Norman v. McKee* is indeed directly on point here, allowing defendants to appeal an order disapproving a consent decree that would have granted injunctive relief against them. The court reasoned that the consent decree was a collateral issue completely distinct from the merits of the case. *Id.* at 773.

Pan Am's reliance on *Norman*, however, fails in view of the Supreme Court's decision in *Carson*. *Carson* explicitly resolved a conflict among the circuits concerning whether and pursuant to what statute an interlocutory order disapproving a consent decree was appealable. The *Carson*

opinion specifically cites *Norman v. McKee* as one of the conflicting cases. *See Carson*, 450 U.S. at 82 & n.6. Although the Court in *Carson*, 450 U.S. at 83 n.7, stated that it need not decide whether the order was appealable under section 1291, we conclude from footnote 6 that *Carson* was clearly intended to provide a definitive basis and standard for such interlocutory appeals, and thus overrules *Norman v. McKee's* reliance on section 1291.

Appendix B

In the United States District Court
for the Northern District of California
No. C-81-3636-RFP

Equal Employment Opportunity Commission,
Plaintiff,

v.

Pan American World Airways, Inc., et al.,
Defendants.

and Related Cross and Third Party Actions.

Memorandum and Order
[Filed Oct. 22, 1985]

Introduction

On September 13, 1985, this court held a fairness hearing to consider objections to a proposed Consent Decree entered into between Pan Am and the EEOC. The Decree is designed to settle an action under the Age Discrimination in Employment Act of 1967 ("ADEA" or "Act"), 29 U.S.C. § 626 et. seq., brought by the EEOC against Pan Am. Pan Am and the EEOC (referred to jointly as "applicants") argue that the proposed Consent Decree fairly reflects the risks of litigation that the parties face.

Several parties have filed objections to the Consent Decree. Forty-five of the eighty-one former Pan Am pilots on whose behalf the EEOC brought this action object to the Decree as providing them with inadequate monetary relief. Most of the objectors (referred to collectively as "claimants") have filed declarations with the court. In addition, those Pan Am pilots and flight engineers who were employed by National Airlines before National and Pan Am merged in 1980 also object to the Decree. These engineers and pilots, in separate filings, argue that the Decree violates their rights as decided by an arbitrator after the merger. Finally, the intervenor Rankin contends that the Decreee violates the provisions of the Employee Retirement Income Security Act (ERISA).

FACTS

The following facts appear in the applicant's Joint Application for Entry of Consent Decree:

Pan Am's aircraft, with the exception of the Boeing 737, have a three person cockpit crew. The captain, or first seat, is in overall command of the aircraft. The first officer, also known as the second seat or copilot, is second in command and assumes the captain's responsibilities in case of his disablement. The flight engineer, or third seat, sits at his own instrument panel and primarily monitors the aircraft's operating systems. During normal operation, the engineer does not handle the flight controls. The Air Line Pilots Association (ALPA) represents the pilots, while the Flight Engineers International Association (FEIA) represents the flight engineers.

In 1962 and 1963, Pan Am and ALPA and FEIA entered into "Crew Complement Agreements" in response to the recommendation of a Presidential Commission that all cockpit crew members be qualified as pilots. These arrangements transformed the position of flight engineer in the entry level position for employment as a first officer or captain. Under these agreements, all newly hired flight engineers, called pilot/flight engineers, must possess pilot qualifications. Pilot/flight engineers were placed on the Pilot System Seniority List, entitling them to bid for first officer and pilot positions.

The agreements also protected employees then serving as flight engineers. Those employees, known as "Appendix A" or professional flight engineers, were given prior rights to all Pan Am engineer positions, as long as they obtained the necessary pilot qualifications. The agreements provided, however, that Appendix A flight engineers, unlike pilot/flight engineers, could not bid for pilot positions.

Pilots may also bid, or "downbid", for engineer positions. For example, pilots may bid for engineer vacancies that result from an overall increase in Pan Am's demand for engineers. In addition, pilots may displace, or "bump", engineers in lieu of furlough. In no instance, however, may a pilot displace an Appendix A engineer.

According to the applicants, these are the only circumstances under which the collective bargaining agreements permit a pilot to displace a flight engineer. Applicants admit that Pan Am, pursuant to an agreement with the ALPA and FEIA, permitted one pilot that lost his first-class medical certificate, required for all pilots by the Federal Aviation Administration (FAA), to continue to fly as a flight engineer after he obtained the second-class certificate required for flight engineers.

Treatment of Age 60 Airmen at Pan Am

Under the FAA's "Age 60 Rule", 14 C.F.R. § 121.383(c), pilots (including first officers) may not serve past the age of 60. This rule does not apply to flight engineers. Pan Am's pension plan, before 1978, provided for the retirement of both pilots and engineers at age 60.

In 1978, Congress amended the ADEA to provide that an employer could not retire its employees at a specified age based solely on a seniority system or pension plan. *See* 29 U.S.C. § 623 (f)(2). In response to the amendments, and after a review of its policies, Pan Am permitted its Appendix A flight engineers to fly past the age of 60. More than 70 Appendix A flight engineers have taken advantage of this new policy. Pan Am did not, however, change its treatment of pilots approaching age 60.

From the effective date of the ADEA amendments, April 6, 1978, until September 28, 1979, there were no flight engineer vacancies for which pilots were eligible to bid. Twenty-eight of the eighty-one claimants turned 60 before the award of the first engineer vacancy. Pan Am, with no opposition from the ALPA, interpreted its collective bargaining agreement to provide for the retirement of these 28 claimants with loss of seniority. Only one claimant, Raymond Russell, filed a grievance concerning this action. The Pan Am-ALPA System Board of Adjustment unanimously upheld Pan Am's interpretation of the collective bargaining agreement. Pan Am and the ALPA later explicitly provided for retirement with loss of seniority at age 60. Pan Am and the EEOC disagree as to whether this provision changed the contract or codified existing practices.

Pan Am bulletined 10 flight engineer vacancies for which pilots were eligible to bid on September 28, 1979. Four pilots, two of whom are claimants here, bid on these positions. To Pan Am's knowledge, no captain had ever before bid for a flight engineer position. (Applicants do not state whether first officers had ever bid for a flight engineer position.) After awarding positions to the pilots, Pan Am notified them that they would be retired at age 60 despite their job change.

Later in the Fall of 1979, Pan Am awarded engineer positions to three more pilots, two of whom are claimants here. The third pilot, Otto Kiehl, is not a claimant in this action. His separate lawsuit against Pan Am, *Kiehl v. Pan American World Airways, Inc.*, C-81-4274 (WAI), was consolidated with this case, but later settled separately. Pilot Joseph Hazelwood, who successfully bid for an engineer position bulletined in January, 1981, and was retired at age 60, joined in Kiehl's action. In January 1983, Pan Am agreed to reinstate both Kiehl and Hazelwood as flight engineers, provided they passed the required training. Both have served as flight engineers and may continue to do so until they reach the age of 70.

Applicants claim that they have located the bid forms of a total of 7 of the claimants, including those mentioned above. Applicants state that two other claimants maintain that they submitted bids. Therefore, according to applicants, only 9 claimants bid for engineer positions. Declarations submitted by the objecting claimants state that many other former pilots were deterred from applying because of Pan Am's well-known policy regarding the ability of 60 year old pilots to downbid.

On February 25, 1983, Pan Am changed its policy towards pilots approaching the age of 60. From that point forward, a pilot approaching 60 who was awarded a flight engineer vacancy and completed his training before the first of the month following his sixtieth birthday could remain as a flight engineer until the age of seventy. Pan Am has continued to retire pilots not meeting these criteria. According to the applicants, "a number of" pilots approaching the age of 60 have served as flight engineers.

The National-Pan Am Merger

The merger of National Airlines and Pan Am in January, 1980, complicates this matter. National Airlines, unlike Pan Am, did not permit pilots or engineers to bid for each other's positions. National kept these two job classifications entirely separate.

The two airlines submitted their dispute regarding the manner in which their seniority lists would be merged to arbitration. On March 12, 1981, Arbitrator Lewis Gill issued his resolution of this dispute. He held that former National airmen would continue not to have bidding rights for engineer positions; the arbitration award, therefore, preserved the differing labor structures of the two firms within Pan Am's overall labor structure.

Procedural Background

The EEOC filed this action against Pan Am in September 1981, alleging that Pan Am's policy towards its sixty year old pilots desiring to serve as flight engineers violated the ADEA. The EEOC sought back pay, liquidated damages, reinstatement, and injunctive and declaratory relief.

The EEOC asserted that Pan Am violated the ADEA by: (1) refusing to permit pilot/flight engineers to serve as flight engineers past the age of 60, (2) refusing to permit a fifty-nine or sixty year old pilot to displace a flight engineer in the absence of a flight engineer vacancy, and (3) forcing age sixty pilots to retire and forfeit their seniority.

Pan Am claimed that its actions were justified. Pan Am asserted that its policies were necessary to the essence of its business, which is the safe transportation of its passengers, and therefore was justified as a bona fide occupational qualification (BFOQ). Alternatively, Pan Am asserted that pilots approaching age sixty had no right under Pan Am's labor agreements to displace engineers and that pilots displaced by the FAA Age sixty rule need not be provided with another position. Pan Am also noted that few of the claimants bid for available Flight Engineer positions.

This case was originally scheduled for trial in April 1983. The parties filed cross motions for summary judgment that Judge Ingram denied at the pretrial conference. Pan Am's motion for summary judgment argued that its collective bargaining agreement, which prohibited pilots to transfer to a flight engineer position and serve past the age of sixty, constituted a bona fide seniority system.

Shortly after Judge Ingram denied the cross motions for summary judgment, the parties entered into a proposed consent decree. The decree provided for reinstatement of the claimants desiring to return to work, and monetary recovery in equal shares from a total of $250,000. After substantial briefing, negotiations, and modification of the decree, and a fairness hearing held on September 28, 1983, Judge Ingram disapproved the decree. *EEOC v. Pan Am World Airways*, 34 Fair Empl. Prac. Cas. (BNA) 321 (N.D.Cal. 1984). Judge Ingram based his decision on the uncertainty in the law in this area, noting that the Supreme Court had accepted *certiorari* in *ALPA v. TWA*, 713 F.2d 940 (2d Cir.), *cert. granted*, No. 83-997 (Feb. 27, 1984). In the interim, the case had been reassigned to this court. Judge Ingram denied reconsideration of his decision on April 19, 1984. Pan Am appealed both decisions, but has since stipulated to a dismissal of its appeals.

The Supreme Court issued its decision in *Trans World Airlines v. Thurston*, 105 S.Ct. 613 (1985), on January 8, 1985. Pan Am immediately requested the Ninth Circuit to remand the case to this court for the limited purpose of considering entering the proposed decree or a modification of it. The Ninth Circuit granted Pan Am's request on February 11, 1985. Applicants proposed the modified Decree that is the subject of this order on July 3, 1985.

The New Consent Decree

The Consent Decree proposes several changes in Pan Am's treatment of pilots and flight engineers. Under the agreement, Pan Am will permit all flight engineers to work until they reach the age of seventy. ¶ 3. In addition, all current Pan Am pilots on the Pilot System Seniority List that possess cross bidding rights (that is, all but the former National Airlines pilots) shall be

permitted to bid for flight engineer vacancies. ¶ 11. The Decree establishes a notice procedure under which pilots approaching retirement can indicate their interest in becoming engineers.

The Decree provides that Pan Am will pay claimants a total of $1,500,000 in three installments. The first installment, to be paid thirty days after Pan Am receives a form from the claimants releasing Pan Am from any liability relating to its policy towards pilots approaching the age of 60, will equal fifty percent of the total. Each of the next two years, Pan Am will pay an additional twenty-five percent of the total.

The Decree divides the payments among the claimants in the following way: First Pan Am will reimburse claimants for the costs of attending their depositions, as approved by the EEOC. Second, Pan Am will divide the remaining funds so that the share received by each claimant corresponds to the length of time the claimant has been retired. In other words, a claimant retired for twice as long as a second claimant would receive a payment twice as large.

The Decree permits the claimants to return to work as flight engineers as long as they can present the appropriate medical certificate and can pass the company physical. Pan Am will offer positions to at least eighteen of the claimants every three months beginning forty-five days after the entry of the Decree. Pan Am will offer these positions to claimants in their order of seniority, except that those claimants who submitted bid forms on Pan Am's approved form will be trained first.

DISCUSSION

Applicants primarily contend that uncertainties concerning the eventual outcome of litigation of this matter require approval of the proposed Decree. The EEOC also argues that the court must approve the Decree unless its provisions are illegal or grossly unreasonable. Furthermore, the EEOC claims that it is bound by its earlier agreement to the consent decree that Judge Ingram rejected, and that subsequent changes in the law do not permit it to alter its agreement with Pan Am.

The court has received objections from several parties. The objecting claimants argue that the Decree is unreasonable in light of the Supreme Court's recent cases involving age discrimination in the airline industry. They also assert that the EEOC has inadequately represented them. Finally, they contend that Pan Am's financial condition has improved recently; therefore, according to the claimants, applicants cannot justify inadequate monetary relief based on Pan Am's poor financial condition.

Both former National Airlines groups, the former pilots and the former flight engineers, have objected to the Decree. In general, they argue that the Decree interferes with the arbitration decision that integrated the two firms' different labor structures.

As a preliminary matter, the EEOC claims that it remains bound by the terms of the 1983 settlement agreement. It claims that a proposed consent decree is like any other contract, and can not be modified unilaterally. The EEOC claims that when Judge Ingram "erroneously" rejected the decree, in March 1984, the EEOC could either have appealed his action or gone to trial, but had no right to modify the decree. The EEOC contends that intervening case law, such as *Thurston*, cannot relieve it of its obligations under the agreement it reached with Pan Am. Indeed, the EEOC states that the only changes it made in the Decree compensated claimants for the salaries they lost from June 1984 to June 1985 when Pan Am appealed Judge Ingram's order, and do not reflect *Thurston*'s clarification of the law. (Claimants maintain that the Decree does not adequately compensate them even for this delay.)

There are several problems with the EEOC's argument. First, the Decree, itself, provides that parties can apply to the court "in the event of a change in facts or a change or *clarification*, judicial or otherwise, of the law." ¶ 13 (emphasis added). The EEOC has conceded that *Thurston* clarified the law. Therefore, the EEOC must be arguing that it could not seek to modify the Decree until after the court had approved it. This position seems completely anomalous.

Second, a consent decree, despite the EEOC's arguments, is not like any other contract. "The terms of the decree, unlike those

of a simple contract, have unique properties. A consent decree has attributes of both a contract and of a judicial act." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983). *See also United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975) ("Consent decrees and orders have attributes both of contracts and of judicial decrees); 2 A. Larson & L. Larson, *Employment Discrimination*, § 56.23 (1985) (consent decree is a hybrid).

Third, Once Judge Ingram rejected the Decree, and especially after the Ninth Circuit remanded the matter, the parties were free to renegotiate its contents. *See SEC v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984) (parties bound by an agreement unless the court fails to approve it). Indeed, the parties did renegotiate the provisions for monetary relief, as well as other provisions. Judge Ingram rejected the Decree because he was "reluctant to venture into uncharted waters by approving of the decree at [that] time." *EEOC v. Pan American World Airways*, 34 Fair Empl. Prac. Cas. (BNA) 321, 323 (N.D.Cal. 1984). Despite the Supreme Court's "charting of the waters" in favor of the claimants, the EEOC seems to believe that it must again urge a court to approve its once-rejected Decree.

Fourth, it was Pan Am, and not the EEOC, that appealed Judge Ingram's order. The Commission did not appeal because it "believed that the process of resolving the case and returning the aging pilots to work would be accomplished more quickly by trial." Plaintiff EEOC's Reply Memorandum to Objections and Motion to Intervene at 16 n.4. It is a year and a half after Judge Ingram disapproved the decree and the claimants still have received no relief. Moreover, Pan Am specifically requested a remand so that this court could consider approving the former decree or a modification.

Finally, the EEOC's contention does not address the court's role. Even if the court were to accept the EEOC's argument that, as a matter of law (as opposed to agency policy), it could not alter the terms of its agreement with Pan Am, that in no way binds the court to accept the earlier agreement. The EEOC points to no authority requiring a court to bind itself to recent court decisions that affect the reasonableness of a proposed decree. Indeed, the

Decree itself permits either party to seek a modification because of a change in the law after approval of the Decree. Therefore, regardless of the correctness or wisdom of the EEOC's view that it is bound by its proposed agreements despite intervening changes in the law, the court must consider all the law in evaluating the Decree.

The Appropriate Standard of Review

"The sole question before the district court in reviewing a settlement agreement is whether the agreement is fundamentally fair or just." *Moore v. City of San Jose*, 615 F.2d 1265, 1271 (9th Cir. 1980). The EEOC agrees that this is the correct standard to apply in evaluating the objections of the National Airlines groups (pilots and flight engineers). The EEOC contends, however, that the court should apply a less rigorous standard when scrutinizing the effect of the settlement on claimants' interests. According to the EEOC, absent collusion, illegal conduct, or grossly unreasonable behavior, the district court must defer to the Commission's decision to settle the case on behalf of the claimants.

The EEOC misconceives the proper role of the district court in reviewing a proposed consent decree. It is true that in reviewing a proposed consent decree, the court should not seek to resolve the underlying factual and legal disputes. *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). In addition, "[t]he proposed settlement is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Id.* (emphasis in original). Furthermore, the court notes the importance of voluntary settlements, especially in employment discrimination actions. *See Officers for Justice v. Civil Service Commission*, 473 F.Supp. 801, 803 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983).

At the same time, the court must still examine the reasonableness of the proposed consent decree, and not completely defer to the EEOC's proposal. Courts reviewing both class action settlements and proposed consent decrees in the employment discrimination context have used the standard of fairness, adequacy, and reasonableness. *See* 2 A. Larson & L. Larson, *Employment*

Discrimination, § 56.31; *see, e.g., Officers for Justice*, 688 F.2d at 625 ("universally applied standard [for reviewing settlement agreement under Rule 23(e)] is whether the settlement is fundamentally fair, adequate and reasonable"); *United States v. City of Alexandria*, 614 F.2d 1358, 1362 (5th Cir. 1980) (court will not approve a Title VII consent decree entered into by government and private party if the decree is unreasonable, illegal, unconstitutional, or against public policy); *Williams v. City of New Orleans*, 729 F.2d 1554, 1559 (5th Cir. 1984) (court must take active role in approving consent decree since the decree has a continuing effect); *Berkman v. City of New York*, 705 F.2d 584, 597 (2d Cir. 1983) (district court should not approve Title VII settlement that contains provisions that are unreasonable, unlawful, or against public policy).

The EEOC correctly states that the court should weigh in favor of approving the proposed Decree the participation of a government agency. *See, e.g., Williams*, 729 F.2d at 1560. But government participation in negotiating a consent decree does not insulate the decree from court review; it is simply one factor that the district court should consider in determining the reasonableness of the decree. *See, e.g., Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) (presence of government agency an important factor in considering acceptability of settlement; standard of review, though, remains the same). *See also City of Alexandria*, 614 F.2d at 1362 (applies same standard in evaluating Title VII consent decree as in case brought by private party).

Moreover, the EEOC's participation should not lower the standard of review for evaluating the claims of those on whose behalf the agency proceeds, as argued by the EEOC. Courts consider the participation of the government in deciding on the fairness of a decree precisely because the government represents the interests of all groups, and not just those on whose behalf the government originally filed suit. *See, e.g., City of New Orleans*, 729 F.2d at 1560 (5th Cir. 1984). Unlike class representatives, the government has an obligation towards all parties. *See id.* In the present case, the EEOC represents the interests of the former EEOC employees, the claimants, and the public at large to the same degree. Likewise, the court should review the reasonable-

ness of the settlement with respect to each group under the same standard.

The few published cases in which a court has reviewed a proposed consent decree in the ADEA context do not counsel adopting a lower standard of review. In *EEOC v. Eastern Air Lines*, 35 Fair Empl. Prac. Cas. (BNA) 498 (S.D.Fla. 1983), fifteen parties sought to intervene after the EEOC and defendants had agreed to a proposed consent decree. The court denied the motion on the basis of the fairness, adequacy, and reasonableness of the decree, citing Title VII cases as support. *Id.* at 502 & n.12. Moreover, the court stated that "[f]airness is not susceptible of determination in a vacuum, but must be evaluated in light of the strength of the charging parties' case as well as other relevant considerations." *Id.* at 503. The court found that "the charging parties' case was not clear cut." *Id.* On the other hand, *EEOC v. Consolidated Edison Co. of New York*, 557 F.Supp. 468, 470 (S.D.N.Y. 1983), suggests that a court has a more limited role in reviewing proposed consent decrees. ("This suit is not a class action nor does it fall within any other of the limited categories of cases in which a Court is called upon to determine the fairness of a settlement.") The court, however, did not elaborate on this reasoning, and later noted that the claimants in that case had only a remote chance of success on the merits. *Id.* at 474.

The court believes that the standard of review of a proposed consent decree should be at least as great in the ADEA context as in the Title VII context. The substantive protections of both Acts are generally to be interpreted in the same way. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-56 (1979); *Criswell v. Western Airlines*, 709 F.2d 544, 548 (9th Cir. 1984), *aff'd*, 105 S.Ct. 2743 (1985). As discussed above, courts reviewing settlements in the Title VII area uniformly use the standard of fairness, adequacy, and reasonableness.

Furthermore, unlike Title VII, the ADEA does not explicitly provide for intervention by private parties in litigation by the EEOC. In fact, there is a strong argument that the ADEA does not permit intervention. *See* Schlei and Grossman, *Employment Discrimination Law*, 2d ed. at 1168 & n. 143 (1983). Title VII gives the individual victim of discrimination a right to intervene

specifically so that he can protect his interests in cases brought by the EEOC. *General Telephone v. EEOC*, 446 U.S. 318, 331 (1980). The court must be at least as protective of the rights of victims of age discrimination, since their rights of intervention are arguably more limited.

Finally, the court notes that a consent decree, unlike an extrajudicial settlement between two parties, bears the imprimatur of the court. "Judicial approval of a settlement agreement places the power and prestige of the court behind the compromise struck by the parties." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983). The court will not lend its authority to a decree that is not "fair, adequate and reasonable." *Id.* at 921. The court's determination involves balancing several factors including the strength of plaintiff's case; the risk of continued litigation; the presence of a government participant; and the amount offered in settlement. *See Officers for Justice*, 688 F.2d at 615. "The most important factor in determining whether the settlement is fair and adequate is the strength of plaintiff's claims." *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 278 (N.D.Cal. 1976). "Ultimately, the district court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.' " *Officers for Justice*, 688 F.2d at 625 (quoting *City of Detroit v. Grinnell*, 495 F.2d 448, 468 (2d Cir. 1974)).

Claimants' Objections to the Proposed Consent Decree

With the above in mind, the court now turns to evaluating the reasonableness of the Decree. The court first notes that the majority of the claimants (45 of 81) have so far objected to the terms of the Consent Decree. This is powerful evidence that the proposed Decree may not reasonably compensate claimants. A proposed settlement can be fair despite a large number of objections. *See, e.g., TBK Partners v. Western Union Corp.*, 675 F.2d 456, 462 (2d Cir. 1982). "At the same time, the number of objectors must be carefully considered." *Reed v. General Motors*, 703 F.2d 170, 174 (5th Cir. 1983); *see also TBK Partners*, 675 F.2d at 462. This is especially true when objectors contend that the proposed recovery is insufficient, rather than that it allocates the amount of recovery inequitably. *See Reed*, 703 F.2d at 174,

175. As stated by the Fifth Circuit, "[w]hile majority rule is not the test in every case, in the context of determining the total back pay award majority sentiment becomes highly relevant." *Pettway v. American Case Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

The court must consider the "package taken as a whole" in judging the fairness of the Decree. The proposed Decree contains both injunctive and monetary relief. Under the Decree, the 81 claimants will receive a total of $1.5 million. Pan Am will not pay this amount all at once, though; the claimants will divide $750,000 within 30 days of approval of the decree, and another $350,000 each of the following two years. Claimants' primary contention is that the Decree's monetary relief is not a reasonable settlement of their discrimination claims against Pan Am.

Monetary relief is especially important in an age discrimination case such as the present one. *Cf. Gabrielle v. Chrysler Corp.*, 573 F.2d 949, 954 (6th Cir. 1978) ("The need for quick dispute resolution is acute in the ADEA context since the very cause of the alleged discrimination, age, grows daily."). Indeed, in response to a survey conducted by the EEOC in early 1985, 36 claimants indicated a desire to return to flying, 32 stated that they no longer wished to be employed, and 13 did not respond. Declaration of Fritz Wollett ¶ 8. One of the 81 pilots has already died, and is represented in this proceeding by his estate. Reinstatement is a hollow remedy for pilots that can no longer fly because of declining health or atrophied skill caused by involuntary retirement.

In *Officers for Justice*, 688 F.2d at 628, the Ninth Circuit approved a settlement that provided plaintiffs with "only a fraction of the potential recovery." However, "[t]hroughout the lengthy history of [that case], the primary concern of the plaintiffs was to halt the allegedly discriminatory practices and to assure the future integration of minorities and women into the S.F.P.D." *Id.* Plaintiffs in *Officers for Justice* directly benefitted from the injunctive provisions of the consent decree approved in that case. The injunctive provisions here, by contrast, only benefit those who remain able to fly after their long, involuntary retirement. Moreover, even this benefit is of limited value since many

of these individuals are nearing the mandatory retirement age of 70.

To evaluate the proposed relief properly, the court must first compare it to the amount plaintiffs could potentially recover discounted by the claimants' likelihood of success on their claims. *See, e.g., Reed*, 703 F.2d 170, 172 (5th Cir.1983) ("A district court faced with a proposed settlement must compare its terms with the likely rewards the class would have received following a successful trial of the case."). As discussed above, though, the court should not reach any ultimate conclusions on contested issues of fact or law. *Officers for Justice*, 688 F.2d at 625.

Claimants could potentially recover much more than the Decree presently provides. In estimating plaintiffs' potential recovery, the court assumes that a flight engineer earns an average salary of $60,000 per year. *See* Fourth Declaration of Sanford Rosen, ¶ 17. Counsel at the hearing did not dispute this figure, and counsel for the EEOC stated that flight engineers actually earn $70,000 per year. Based on the actual retirement dates of 13 of the claimants, Pan Am owes claimants an average of $330,000 each. *See id.* Assuming that this group is a representative sample of all 81 claimants, and there is no evidence to the contrary, Pan Am is potentially liable for approximately $26.7 million ($300,000 per claimant multiplied by 81 claimants). Counsel for Pan Am, in response to a question from the court, conceded that Pan Am's liability could be as much as $20 million.

This $26.7 million figure conservatively estimates Pan Am's liability. The $26.7 million does not compensate claimants for inflation or the time value of money. *See Criswell v. Western Airlines*, 514 F.Supp. 384, 396 (C.D.Cal. 1981) (granting prejudgment interest at the California statutory rate of seven percent in age discrimination action). In addition, if Pan Am flight engineers actually earn $70,000 per year, as suggested by counsel for the EEOC, Pan Am's liability would increase by approximately $4.5 million. Furthermore, the $26.7 million figure is current only through August 1985; each month Pan Am incurs an additional liability of approximately $320,000 ($4,000 per month in salary multiplied by 81 claimants).

Pan Am could face even greater liability. If this case were to go to trial, a court could award front pay to the claimants. *See, e.g., Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1448, 1449 (11th Cir. 1985) ("an award of front pay . . . may be an appropriate remedy in an age discrimination suit because reinstatement would be impracticable or inadequate."); *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1319, 1320 (9th Cir.) (damages in lieu of reinstatement permissible in ADEA case in which employee and employer can no longer coexist in a working relationship), *cert. denied*, 459 U.S. 859 (1982). This case, originally filed in 1981, may have engendered the type of atmosphere in which a court would award front pay.

Pan Am also faces the possibility of liability for double damages for willfully violating the ADEA. *See* 29 U.S.C. § 626 (b). A violation of the Act is willful if an employer either knows its behavior violates the Act or shows reckless disregard for the Act's requirements. *Trans World Airlines v. Thurston*, 105 S.Ct. 613, 624 (1985). An employer can violate the Act willfully without having "an evil motive or bad purpose." *Id.* at 624 n.19.

In *Thurston*, the Supreme Court reversed the Second Circuit's finding that TWA willfully violated the Act. The Court found that "TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA." *Id.* at 626. After meeting with its attorneys to discuss the effect of the 1978 amendments to the ADEA, TWA adopted a plan that would permit 60 year old pilots in "flight engineer status" to continue working for the airline. *Id.* TWA adopted this policy over the vehement objections of the Air Line Pilots Association, which filed a separate lawsuit against TWA. *Id.*

TWA, thus, immediately examined the legality of its policies under the ADEA and, in 1978, became "the only trunk airline that voluntarily . . . permitted [persons] over 60 to continue working as flight engineers." *Id.* at 625 n.23 (quoting *Thurston v. Trans World Airlines*, 713 F.2d 940, 957 (2d Cir. 1983) (Graafeiland, J., dissenting)). Within months after Congress amended the ADEA, TWA permitted pilots to bid for flight engineer vacancies, which allowed them to work beyond 60. Pan Am, in sharp contrast, did not permit pilots to bid for vacancies and remain

with the airline past the age of 60 until 1983, five years after the amendments to the ADEA. Unlike TWA, which sought, though unsuccessfully, to comply with the ADEA, Pan Am did not alter its policy towards its pilots in response to the 1978 amendments. While the court does not find that Pan Am would be liable for willfully violating the Act, the possibility of double damages in this case does dramatically raise Pan Am's potential liability.

Moreover, the $1.5 million that the Decree offers to claimants is less than first appears. Claimants would receive only half of this amount now, and the remainder over a two year period. They receive no compensation for the effects of inflation or the interest they have foregone.

In sum, Pan Am faces a potentially substantial liability. Indeed, counsel for Pan Am conceded that Pan Am could be liable for $20 million. The Consent Decree offers claimants $1.5 million, spread out over 2 years with no compensation for inflation or the time value of money. The fairness of reducing claimants' potential recovery to this extent turns on the strength of claimants' underlying claim.

The Strength of the Claimants' Case

The major dispute between claimants and applicants concerns the effect on the present case of recent decisions involving age discrimination claims brought by pilots against airlines. The EEOC originally argued that Pan Am violated the ADEA by not permitting age 60 pilots to displace (or "bump") flight engineers and continue flying. Pan Am argued that it permitted pilots to displace flight engineers only in the limited circumstances permitted under its collective bargaining agreement, a bona fide seniority system. Claimants argue that the Supreme Court's recent decision in *Trans World Airlines v. Thurston*, 105 S.Ct. 613 (1985), establishes that Pan Am's policy violated the ADEA.

Pan Am also contends that its policy of not permitting pilots to serve as flight engineers past the age of 60 may be justified as a "bona fide occupational qualification (BFOQ)." Pan Am argues that *Johnson v. American Airlines*, 745 F.2d 988 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3500 (1985), provides support for this position. Claimants assert that *Johnson* is distinguishable from

the present case, and that it provides little support for Pan Am now that the Supreme Court has issued *Thurston*.

The effect of Thurston

Thurston, like the present proceeding, involved an airline's treatment of age 60 pilots. In 1977, TWA and the Air Line Pilots Association (ALPA) entered into a collective bargaining agreement under which all employees in a cockpit position would retire at age 60. This provision was lawful under the ADEA as a "bona fide seniority system." Effective April 6, 1978, Congress amended the ADEA to prohibit the mandatory retirement of an individual because of his age. In response to the 1978 amendments to the ADEA, and over opposition from its union, TWA changed its treatment of age 60 pilots. TWA began permitting any employee in "flight engineer status" to continue working beyond the age of 60. A captain could obtain "flight engineer status" by bidding for a position under the collective bargaining agreement. He would receive a position only if there was a vacancy. *Id.* at 618-19.

A captain displaced for reasons other than age did not need to use the collective bargaining procedures. For example, if TWA eliminated a captain's position because of reduced manpower needs, the captain could bump a less senior flight engineer. Similarly, captains displaced for medical reasons, or other reasons relating to their competency to serve, could automatically bump flight engineers. *Id.* at 619.

The Supreme Court unanimously held that TWA's policy violated the ADEA. "The Act does not require TWA to grant transfer privileges to disqualified captains. Nevertheless, if TWA does grant some disqualified captains the 'privilege' of 'bumping' less senior flight engineers, it may not deny this opportunity to others because of their age." *Id.* at 621. Moreover, TWA could not defend its policy as part of a "bona fide seniority system." "[A]ny seniority system that includes the challenged practice is not 'bona fide' under the statute. The Act provides that a seniority system may not 'require or permit' the involuntary retirement of a protected individual because of his age." *Id.* at 623.

In many ways, TWA treated its age 60 pilots more even-handedly than Pan Am did. Beginning in 1978, TWA permitted

age 60 pilots to bid for flight engineer vacancies. Pan Am did not permit pilots approaching age 60 this privilege until 1983, two years after the commencement of this action. Pan Am, however, had permitted younger pilots to bid for flight engineer vacancies ever since 1963. At Pan Am, unlike TWA, a pilot approaching the age 60 could not even take advantage of a flight engineer vacancy so that he could continue flying.

Moreover, Pan Am's policy regarding a pilot's ability to bump a flight engineer seems directly analogous to TWA's. At Pan Am, like TWA, a pilot displaced because of a reduction in the airline's need for pilots could displace less senior officers, including flight engineers. In addition, on one occasion Pan Am permitted a pilot disqualified for medical reasons to serve as a flight engineer. Indeed, Pan Am still does not permit a pilot approaching the age of 60 to displace a flight engineer.

Pan Am contends that its actions are distinguishable from TWA's. It argues that since it did not automatically permit a displaced pilot to bump a flight engineer, it did not violate the ADEA. Pan Am misapprehends the meaning of *Thurston*. *Thurston* specifically stated that an airline could not "grant *some* disqualified captains the 'privilege' of 'bumping' less senior flight officers," while "deny[ing] this opportunity to others because of their age." *Id.* at 621 (emphasis added). A Pan Am pilot displaced because of his age could never displace a flight engineer, while pilots displaced for other reasons could. The fact that TWA permitted pilots displaced for reasons other than age greater opportunities to displace flight engineers than Pan Am did does not make Pan Am's policy less discriminatory. Discrimination cannot be quantified in this way; an employer either deprives an employee a privilege of employment because of the employee's age or it does not. Pan Am deprived its age 60 pilots of privileges available to other employees.

The EEOC implicitly acknowledges that Pan Am's policy violates *Thurston*. Unlike Pan Am, the EEOC speaks of *Thurston's* "clarification of the law governing the rights of age-60 pilots to transfer to flight engineer positions." Plaintiff EEOC's Reply Memorandum to Objections and Motion to Intervene at 1. Instead of arguing that the law remains uncertain, as Pan Am

does, the EEOC contends that recent cases "do not give the Commission the right to change the terms of the settlement reached in 1983 when the law was much less certain and the risks of litigation substantially greater." Reply Memorandum at 13. The EEOC does concede that "[i]t is unfortunate, perhaps, that the Commission's lawyers were not blessed with greater foresight so that they could have anticipated in early 1983 the ultimate outcome in *TWA* and *Western*." Reply Memorandum at 28.

Furthermore, Pan Am would have great difficulty claiming that its policy resulted from a bona fide seniority system. *Thurston* specifically held that a seniority system that required or permitted the involuntary retirement of a protected individual because of his age was not bona fide under the Act. *Thurston*, 105 S.Ct. at 623. Pan Am's seniority system seems to come within this language.

The Effect of Johnson

Pan Am contends that it based its policy towards 60 year old pilots on a bona fide occupational qualification. Pan Am argues that its policy of not permitting former captains to become flight engineers was designed to prevent the effects of "command syndrome." Command syndrome occurs, according to Pan Am, when a senior airman placed in a subordinate position mentally or physically resumes his former role as captain, especially during emergencies. (In common terms, and in *Johnson*, this phenomenon is called "back seat driving.") Command syndrome can interfere with the new captain's commands, or divert the attention of the engineer himself. In either case, according to Pan Am, command syndrome endangers passenger safety—the essence of its business. Claimants contend that *Johnson* does not provide authority for Pan Am's claimed defense.

Plaintiffs in *Johnson* challenged American's policy of requiring all members of the cockpit crew, including flight officers (the equivalent of Pan Am's flight engineers), to retire or transfer to non-cockpit positions at age 60. American, like Pan Am, operated its aircraft with a three-person crew that included a flight officer who did not actually pilot the plane. Unlike Pan Am, however, American did not allow any individual who could not ascend to the rank of captain to remain in the cockpit. American argued

that employing ex-captains as flight officers would both block the advancement of other cockpit crew members to the pilot position, and present a safety hazard since former pilots might revert to their old roles during emergencies. 745 F.2d at 991. The Fifth Circuit affirmed a jury verdict that American Airlines had established a BFOQ defense.

A court should use a two-part inquiry for deciding the merits of a BFOQ defense. *Western Airlines v. Criswell*, 105 S.Ct. 2743, 2753 (1985). First, the qualification that the employer claims it is seeking must be reasonably necessary to the essence of its business. *Id.* at 2751. Second, the employer can rely on a particular age as a proxy for safety-related job qualifications only when it is compelled to do so. The employer can establish this in one of two ways: First, the employer can show that it had a factual basis for believing that all or substantially all of the persons over the particular age would be unable to perform the job safely. Alternatively, the employer can establish that it is impossible or highly impractical to deal with employees on an individualized basis. *Id.* at 2752.

In *Johnson*, defendant introduced sufficient evidence to support a BFOQ defense. Defendant presented evidence that permitting pilots to become flight officers would block the training position for future pilots and endanger safety. Defendant also presented two expert witnesses who testified that the presence of senior ex-captains as flight officers created a possibly dangerous situation. The expert witnesses testified that it was impossible to determine which ex-captains would pose a safety hazard.

Johnson, however, does not provide Pan Am with a strong defense of its policy. First, *Johnson* had failed to move for a directed verdict or judgment notwithstanding the verdict. Therefore, the court limited its review "to whether there was *any* evidence to support the jury verdict." 745 F.2d at 994 (emphasis in original).

Second, *Johnson* specifically declined to decide whether an employer could use a BFOQ defense when it made exceptions to its general policy. *Id.* at 994 n.4. The court noted that that question was pending before the Supreme Court in *Thurston*, and

stated that the issue had not been presented to it. *Thurston*, as discussed above, held that an employer cannot deny employees based on age the privileges it grants other employees.

Pan Am permits numerous exceptions to its general policy of preventing senior pilots from flying as flight engineers. These exceptions undermine Pan Am's contention that its policy is based on safety concerns. Pilots can become flight engineers in lieu of furlough, for example. One pilot that no longer qualified for a first class medical certificate also began flying as a flight engineer. Indeed, Pan Am's policy since 1983 of permitting pilots approaching age 60 to bid for flight engineer vacancies belies its argument that permitting senior pilots to fly as flight engineers would endanger the safety of the flying public. Pan Am has also permitted former pilots Kiehl and Hazelwood, who brought a separate age discrimination suit against Pan Am, to return as flight engineers. The Supreme Court has rejected a BFOQ defense precisely because the employee was "able to point to reputable businesses in the same industry that . . . eschew[ed] reliance on mandatory retirement earlier than 70." *Western Airlines v. Criswell*, 105 S.Ct. 2743, 2756 (1985). Claimants can point both to other reputable businesses in the same industry, such as TWA, and to Pan Am's practice, itself, in refutation of any evidence of safety concerns that Pan Am could offer. Finally, the Supreme Court has recently stated that "like its Title VII counterpart, the BFOQ exception 'was in fact meant to be an extremely narrow exception to the general prohibition' of age discrimination contained in the ADEA. *Criswell*, 105 S.Ct. at 2751 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977)).

Pan Am's Financial Status

Claimants contend that Pan Am's recently improved financial position permits Pan Am to increase the monetary compensation it has offered them. Pan Am does not specifically contradict this statement, but recites financial statistics that ostensibly establish Pan Am's weak financial health. Neither party has demonstrated Pan Am's actual financial status. Pan Am cites its losses for the years 1980-1984 without giving a sense of the airline's current condition, or the breakdown by year of these losses. In addition, even these statistics only account for the losses of Pan American

World Airways, excluding World Services and Pan American Corporation. The court has no basis for determining the nature of the relationship among these various related entities. Moreover, Pan Am does not provide any data on the effect that a larger settlement would have on its financial health or the current economic viability of the airline. Claimants' data consist of newpaper and magazine articles discussing Pan Am's economic prospects. The court cannot draw conclusions of any kind regarding Pan Am's financial condition based on the sketchy data presented by the parties.

Claims of Third Parties

Objections of Former National Airlines Flight Engineers and Pilots

The former National Airlines flight engineers object to paragraph 14 of the Decree, which provides:

> The terms of the Award of Lewis M. Gill dated March 12, 1981, remains [sic] unchanged, but shall not be a bar to the right of a claimant or current pilot who possesses cross-bidding rights to be awarded or be assigned to a Flight Engineer position under the terms of this Consent Decree.

According to the NAL engineers, this paragraph would impermissibly destroy their legitimate expectations and lawful rights by permitting the 81 claimants and all future Pan Am pilots to transfer to engineer positions held by former National Airlines employees.

The former National Airlines Pilots also base their objections on the terms of the Gill award. Under the award, until the end of 1985, furloughs alternate between Pan Am employees and former National Airlines employees. The former National pilots bear ⅔ of the burden of the furloughs borne by former National employees. They argue that the Decree may force the furlough of some former National pilots.

Pan Am correctly notes that this situation will almost inevitably not occur. The first flight engineers trained under the Decree would not likely be able to assume positions for three or four months. As it is already the end of October, and the court

disapproves the Decree, the alternating system will not be in effect if and when the first newly trained flight engineers are ready to assume their positions.

The former National Airlines pilots also assert that they will lose positions in the future as a result of the Decree. They argue that some of the engineers displaced by pilots in the future may, in turn, be able to displace former National pilots with less seniority.

The heart of both groups' claims is that the Decree would upset the provisions of the Gill Award, described above, which merged the seniority lists of Pan Am and the former National Airlines. Under the Gill Award, the seniority systems of the different employee groups remained, in effect, substantially the same as before the merger; former National pilots and engineers continued to have no bidding rights whatsoever for each other's positions. Indeed, the former National groups are in separate bargaining units from the Pan Am groups. Since former National employees were not involved in any way with the practices challenged by the EEOC, and because the Decree does not benefit any former National employees, they object to the Decree.

During the course of the fairness hearing, counsel for applicants contended that the Decree would not interfere with the provisions of the Gill Award. Counsel argued that disputes involving interpretation of the Gill award could be solved by arbitration, as the award provides, notwithstanding the Decree. In response to a suggestion from the court, counsel agreed to rewrite paragraph 14 of the Decree to reflect this understanding that the proposed decree would not interfere with the Gill Award and its mechanisms for resolving disputes concerning its interpretation. The court believes that this reasonably resolves the dispute between applicants and the National Airlines groups as it preserves their right to arbitrate any disputed interpretation of the Gill Award without the bar of a federal judgment.

Objection of Intervenors Rankin et. al.

Rankin, a furloughed Pan Am pilot/flight engineer (as are his fellow intervenors), claims that the Decree violates the terms of

the Employee Retirement Income Security Act (ERISA). Rankin raises two arguments: First, he claims that returning and current pilots are not eligible for retirement benefits, as the Decree seemingly provides. Second, he contends that Pan Am has breached its fiduciary duty to the participants in the plan by using retirement funds to settle its dispute with the EEOC. Pan Am disputes Rankin's arguments.

The Consent Decree does not establish that pilots who become flight engineers are automatically entitled to receive retirement benefits while working. The Decree only states that returning pilots "shall receive such benefits . . . to which they are entitled in accordance with the terms of the plans as of their normal retirement date as a pilot." ¶ 9. These are funds that the returning pilots would receive whether or not they returned as flight engineers.

Moreover, the court need not presently determine whether returning flight engineers are entitled to continue to receive pension benefits. Pan Am's plan specifically provides for a dispute resolution procedure, as required by ERISA. *See* 29 U.S.C. § 1133. Indeed, the Ninth Circuit requires that a party exhaust his administrative remedies before bringing an ERISA claim to the court. *See Amato v. Bernard,* 618 F.2d 559, 566, 567 (9th Cir. 1980). As with the claim by the former National employees, the court finds that it would be reasonable to require intervenor Rankin to use the appropriate dispute resolution mechanisms instead of resolving his claim first at the federal court level. *See id.* at 568 ("[P]rior fully considered actions by pension plan trustees interpreting their plans and perhaps also further refining and defining the problem in given cases, may well assist the courts when they are called upon to resolve the controversies.").

On Claimants' Motion to Intervene

The objecting claimants have moved to intervene for the limited purpose of objecting to the proposed Decree. Pan Am asserts that claimants have no statutory right to intervene in any aspect of this action. They argue that the statutory scheme presumes that the EEOC is an adequate representative, and vests the EEOC with the exclusive right to pursue claims it has filed.

The EEOC does not object to the claimants' intervention for the limited purpose they seek.

Section 7(c)(1) of the ADEA, 29 U.S.C. § 626 (c)(1), provides:

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the [EEOC] . . . to enforce the right of such employee under this chapter.

Courts and commentators disagree on the extent to which this provision prevents intervention in ADEA actions brought by the EEOC. *See, e.g., EEOC v. Boeing,* 37 Fair Empl. Prac. Cas. (BNA) 1657 (W.D. Wash. 1985); Schlei and Grossman, *Employment Discrimination Law,* 2d ed. at 1168 & n.143 (1983). The EEOC has not taken an official position on this issue.

The court need not enter this fray since claimants presently seek to intervene only to object to the Decree. In *Boeing,* airline pilots who were being represented by the EEOC in an ADEA action against Boeing sought to intervene. The court rejected both mandatory and permissive intervention as counter to the statutory scheme of the ADEA. The court did, however, permit "limited participation" under its equitable powers. *Id.* at 1660. The pilots' status was a "hybrid . . . fall[ing] somewhere between that of an *amicus* and an intervenor." *Id.* at 1657 n. 2. The court cited the EEOC's lack of opposition to limited participation in support of its order. *Id.* Similarly, the EEOC in this proceeding has not objected to the claimants motion to intervene for purposes of objecting to the consent decree. The court, analogously to *Boeing,* permits claimants to intervene for the limited purpose of objecting to the Decree.

CONCLUSION

After carefully considering applicants' arguments, and the objections of the various parties, the court disapproves the Decree. The settlement agreement offers claimants inadequate compensation for their years of involuntary retirement. In addition, a majority of claimants have formally objected to the Decree. Despite the government's participation in this action, and the preferred place of settlements in employment discrimination actions, the court cannot approve the Decree.

IT IS SO ORDERED.

October 21, 1985

/s/ ROBERT F. PECKHAM
Chief United States District Judge

Supreme Court, U.S.
FILED
OCT 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-525 (2)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

VS.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.
AND RELATED CROSS AND THIRD PARTY ACTIONS.

OPPOSITION OF FORMER PAN AMERICAN PILOTS/CLAIMANTS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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8 A 1 P

QUESTIONS PRESENTED

1. Can a defendant in an Age Discrimination in Employment Act ("ADEA") case appeal under 28 U.S.C. § 1292(a)(1) from a district court's interlocutory order denying a motion joined by plaintiff, the EEOC, to enter a consent decree containing injunctive and monetary relief that would settle the entire action where: (1) the plaintiff-appellee opposes the appeal, and (2) the ADEA injunctive relief was directed against the defendant-appellant?

2. Can defendant appeal rejection of the consent decree as an appeal from a "collateral order" under 28 U.S.C. § 1291, where the defendant was not barred from settling the lawsuit for the same or similar injunctive relief that was included in the rejected consent decree?

LIST OF PARTIES

The Petitioner is Pan American World Airways, Inc. It was defendant and Appellant below.

The Equal Employment Opportunity Commission (EEOC) is a Respondent here and was plaintiff and an Appellee below.

The National Airlines Chapter of the Flight Engineers' International Association (FEIA) is a Respondent here and was an Appellee and Intervenor-Objector below.

Former Pan American Pilots/Claimants William E. Bacheler, Charles Baer, John W. Bateman, William L. Bay, Carl E. Benson, D.R. Berg, John R. Brons, Deaderick G. Browne, John C. Burn, W.R. Chamberlin, Norman C. Christiansen, Wayne E. Cook, Jerry Crance, Joseph Davis, Jr., Francis X. Duffy, Joseph Dupre, Ray Egan, Melvin J. Fuller, Charles R. Gordon, Joseph Greely, Edwin F. Herr, Sumner K.

Hushing, William R. Jordan, Edward A. Karasek, James E. Kowing, Fred Landa, Richard Mayhew, Frank McColgin, Henry McFail, Fred McLaughlin, Robert McMurray, Merlin H. Mills, Daniel B. Mulholland, J.C. Musser, James C. Nelson, Victor Nittolo, Raymond Pearson, Herbert G. Petty, Wilbur W. Pickering, John L. Raabe, Warren H. Roberts, Darrell Rogers, William J. Rooney, Gerald B. Ross, Raymond J. Russell, Jr., Elliott Schreider, John F. Scott, Edward Shaffer, Dwight L. Shrum, Charles A. Smith, Lennart Thorell, George Tondorf, Claude R. Turner by his estate, F.D. Vanderhoof, Elvin Voges, Harlow Willard and Robert Wyland (who constitute 57 of the 81 ADEA pilot-claimants involved in this action) are Respondents here, and were Appellees and Intervenor-Objectors below.

The remaining ADEA claimants are Eugene R. Banning, George Blackford,

Gordon S. Burchett, Francis Colbert, Richard B. Fenimore, A.E. Fritz, Charles Hawkins, Arthur E. Hillier, Blake Hirsh, Roy F. Hutchinson, Fred Knotts, W.K. Langhorne, Robert D. Larsen, Fred Linari, W.G. Morey, Robert K. Polson, R.P. Reynolds, Joseph F. Ross, Joseph B. Sceili,* Thuel V. Schuhart,* Edwin W. Sippel, G.E. Taylor, Arthur P. Valla, and Richard W. Willis.* (The ones who have asterisks next to their names submitted pro se objections to the consent decree in the district court and are unrepresented by the undersigned.)

The Airline Pilots Association (ALPA) was a Rule 19(a), F. R. Civ. P. defendant in the district court, and took no position in the court of appeals.

The Pan American Chapter of the Flight Engineers International Association (FEIA) was a Rule 19(a), F. R. Civ. P. defendant in the district court

and took no position in the court of appeals.

A group of former National Airlines pilots, represented by Captains Charles Caudle and Vincent Wynne, were Intervenor-Objectors in the district court. They took no position in the court of appeals.

A group of Pan American furloughees, represented by A.M. Rankin, were Intervenor-Objectors in the district court. They took no position in the court of appeals.

Counsel for all parties are identified in the proof of service.

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No. 86-525

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PAN AMERICAN WORLD AIRWAYS, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

AND RELATED CROSS AND THIRD PARTY ACTIONS.

OPPOSITION OF FORMER PAN AMERICAN PILOTS/CLAIMANTS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The 57 former Pan American Pilot claimants represented by the undersigned counsel respectfully request that this Court deny the Petition for Writ of Certiorari. They contend that no grounds exist for granting a Writ of Certiorari to review this interlocutory appeal as:

(1) The court of appeals correctly held that the district court order refusing to enter the consent decree was not appealable because the appealing party, defendant Pan Am, was not denied injunctive relief as contemplated under 28 U.S.C. § 1292(a)(1), and the order was not a "collateral order" appealable under 28 U.S.C. § 1291; (2) The court of appeal's decision did not conflict with the decision of this Court in Carson v. American Brands, Inc., 450 U.S. 79 (1981); (3) There is no conflict among the circuits on a significant, important or recurring question, either under 28 U.S.C. § 1292(a)(2) or the "collateral order" doctrine under 28 U.S.C. § 1291; (4) The court of appeals' holding in this case depends upon the special facts in this case including, inter alia, the fact that plaintiff, the Equal Employment

Opportunity Commission ("EEOC"), Pan Am's co-proponent of the consent decree in the district court, abandoned the consent decree on appeal, and argued for affirmance of the district court's order rejecting the consent decree (see Append. hereto at A 15-18); and (5) The consent decree proffered by Pan Am and the EEOC on its face was plainly inadequate, especially in light of this Court's decisions in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 83 L.Ed.2d 523 (1985), and Western Airlines, Inc. v. Criswell, ___ U.S. ___, 86 L.Ed.2d 321 (1985), and was properly rejected by the district court.

OPINIONS BELOW

The August 8, 1986 per curiam opinion of the court of appeals is

reported at 796 F.2d 314 and is reprinted in the Appendix to the Petition (A 1-7).

The October 22, 1985 opinion of the United States District Court for the Northern District of California is reported at 622 F.Supp. 633 and is reprinted in the Appendix to the Petition (A 8-34).

The March 6, 1984 opinion of the district court is not officially reported. However, it is reported at 34 Fair Empl. Prac. Cas. (BNA) 321, and is reprinted in the Appendix hereto (A 1-13).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 8, 1986. This Court has jurisdiction to review the judgment of the Ninth Circuit under

28 U.S.C. § 1254(1) (1982). These Respondents respectfully request that this Court, in exercising its judicial discretion, deny the Petition.

STATUTES INVOLVED

28 U.S.C. § 1292(a)(1) provides, in relevant part, that "the courts of appeals shall have jurisdiction of appeals from ... [i]nterlocutory orders of the district courts of the United States ... granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions."

28 U.S.C. § 1291 provides in relevant part that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT OF THE CASE

This representative action under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-33a was filed by the EEOC against Pan Am in September 1981, alleging that Pan Am discriminated against pilots desiring to serve as Flight Engineers past the age of 60. The Airline Pilots Association ("ALPA") and the Flight Engineers International Association ("FEIA"), certified collective bargaining Pan Am pilots and flight engineers were joined as Rule 19(a) F. R. Civ. P. defendants.

The EEOC sought back pay, reinstatement of claimants as Flight Engineers, injunctive and declaratory relief and liquidated damages. At present, 81 former pilots ("claimants") between the ages of 65 and 70 or the estates of

some of them are subject to the outcome of this litigation.

In 1962 and 1963, Pan Am entered into written agreements called "Crew Complement Agreements" with ALPA and FEIA. These agreements provided that all newly-hired Flight Engineers would be required to possess pilot qualifications and be placed on the Pilot System Seniority List. Thus, all new Flight Engineer positions were to be filled by pilot-qualified Flight Engineers, who were entitled to bid for pilot positions. The non-pilot Flight Engineers, then employed by Pan Am, were "grandfathered" on the top of the Flight Engineers' duty roster, as identified on Appendix A to the Crew Complement Agreements.

In response to the 1978 amendments to the ADEA, Pan Am allowed "Appendix A" Flight Engineers to continue flying past

age 60. Since 1978, more than 70 "Appendix A" Pan Am Flight Engineers have continued to serve past the age of 60. Non-Appendix A, or pilot-qualified Flight Engineers, were not permitted to continue flying as Flight Engineers past age 60.

Since adoption of the Crew Complement Agreements, pilots at Pan Am have been permitted to downbid to a Flight Engineer vacancy and are permitted to "bump" Flight Engineers in lieu of furlough (layoff). Further, Pan Am has permitted at least one pilot a medical "hardship" downbid to Flight Engineer. In addition, two former Pan Am command pilots, Otto Kiehl and Joseph Hazelwood, who were working as Flight Engineers at the time of their forced retirement at age 60, returned to work pursuant to a Consent Decree entered in Kiehl v. Pan

Am, No. C-81-4274 WAI (N.D. Cal. 1983). Finally, on February 25, 1983, Pan Am announced a new policy of permitting pilots who bid for and were awarded Flight Engineer vacancies and started training before the first month following their 60th birthdays to remain as Flight Engineers until the age of 70. Pan Am admits that a number of pilots approaching age 60 have now bid for and been awarded Flight Engineer vacancies and have served as such after reaching age 60.

A. The First Proposed Consent Decree

In May 1983, Pan Am and the EEOC moved for entry of a proposed Consent Decree in this case. Claimant Raymond L. Russell, Jr. was permitted to intervene for the purpose of objecting to that proposed 1983 Consent Decree. Several

other pilots objected as well. Russell's motion to intervene with full party status was denied without prejudice.[1/]

Under the terms of the 1983 Consent Decree, each claimant was forced to elect whether to return to Pan Am as a Flight Engineer or to receive $4,000 to $5,000, out of a settlement fund of $250,000, as full compensation for his involuntary termination by Pan Am at age 60.

After considering objections from a number of former pilot ADEA-claimants and other groups, the district court rejected the 1983 Consent Decree. The court, noting the grant of review by the this Court in Airline Pilots Association v.

1/ Russell has his own related duty of fair representation and contract breach lawsuit pending in the district court, Russell v. ALPA, U.S.D.C., N.D. Cal. No. C 81 4590-RFP.

Trans World Airlines, 713 F.2d 940 (2nd Cir. 1983), cert. granted, 465 U.S. 1065 (1984), expressed its reluctance "to venture into unchartered waters." Append. hereto at A 12-13.[2/]

On June 5, 1984, Pan Am filed and served its notice of appeal, seeking only remand to the district court with instructions to pass upon the merits of the 1983 Consent Decree. The EEOC did not appeal, "because it 'believed that the process of resolving the case and returning the aging pilots to work would be accomplished more quickly by trial.'" Pet. Append. at A 16. Motions to dismiss the appeal for lack of appellate

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2/ The district court was also aware of the Ninth Circuit's decision, favorable to ADEA claimants, in Criswell v. Western Airlines, Etc., 514 F.Supp. 384 (C.D. Cal. 1981), aff'd, 709 F.2d 544 (9th Cir. 1983). Append. hereto at A 12.

jurisdiction were consolidated with the merits.

On February 11, 1985, on Pan Am's motion, the court of appeals entered an Order granting limited remand to allow the district court to reconsider its refusal to enter a consent decree or to consider the entry of a modified decree.

B. The Revised Consent Decree

On July 3, 1985, Pan Am and the EEOC jointly moved for approval of a revised proposed consent decree. According to them, the 1985 Consent Decree was "virtually identical" to the 1983 version. Their motion was made after, but did not refer to, this Court's decision in Western Airlines, Inc. v. Criswell, __ U.S. __, 86 L.Ed.2d 321 (1985).

Unlike the 1983 Consent Decree, the 1985 Consent Decree did not require former pilots to elect between returning to Pan Am as a Flight Engineer or sharing in the monetary recovery. The living claimants can seek reinstatement and all 81 claimants would share in $1.5 million as full settlement of all claims against Pan Am. Each claimant would have received approximately $300 for each month of involuntary retirement, paid in three installments over two years, without interest.

Pan Am's potential liability for back pay alone at that time was more than $26 million. Pet. Append. at A 22. Further, the record is replete with compelling evidence that, with the passage of many years since their involuntary retirement at age 60, many claimants can no longer make the

transition to Flight Engineer, although they would have been able to do so at age 60 before retiring. See Pet. Append. at A 21, A 23. And, the presence in this action of Mrs. Lou Ann Turner, Trustee for the Trust of Claude R. Turner, demonstrates that for some pilots there can only be some monetary compensation to their estates.

Other inadequacies of the 1985 Consent Decree include, inter alia, the following: (1) For purposes of competing with other active Flight Engineers, the seniority of any claimant who is reinstated will be limited to the seniority accrued as of his normal retirement date at age 60. (2) In the future, Pan Am will allow pilots reaching the age of 60 to be placed in the position of Flight Engineer only if they indicate their elections to do so prior

to reaching age 59½. But cf., Trans World Airlines, Inc. v. Thurston, supra, 83 L.Ed.2d at 532.

By comparison with the benefits offered in the 1985 Consent Decree, former Pan Am Pilots Kiehl and Hazelwood settled their case in 1983 for full back pay of $90,000 and $45,000, respectively, the opportunity to recommence employment with Pan Am at full pay, full seniority rights as Pan Am Flight Engineers as if they had not retired at age 60, and attorneys' fees.

C. The Proceedings in the District Court

More then 40 claimants were granted leave to intervene for the purpose of

objecting to the terms of the decree. Pet. Append. at A 20, A 32-33.[3/] They contended that, in light of the two unanimous decisions of this Court in 1985 involving TWA (Thurston) and Western Airlines (Criswell), the 1985 Consent Decree was inappropriate, unfair, unjust and unreasonable, especially with respect to monetary relief for the claimants.

In their July 3, 1985 Joint Application for Entry of Consent Decree, Pan Am and the EEOC declared that: "The essential question before the Court at

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3/ In addition, 6 claimants submitted pro se their objections to the district court. Three of them have since retained the undersigned counsel to oppose the 1985 proposed Consent Decree and to protect their interests. The undersigned presently represent 57 objectors; in addition, three of the pro se objectors in the district court have not retained separate counsel. This makes a present total of 60 objectors, or nearly 75% of the claimants.

this time is '... whether the [proposed settlement] is fundamentally fair or just?' Moore v. City of San Jose, 615 F.2d 1265, 1271 (9th Cir. 1980)" (a Title VII class action lawsuit). They also specifically asserted that their proposed settlement was "an appropriate, fair and just resolution" of the case.

D. District Court Opinion

On October 21, 1985, the district court, in a comprehensive opinion, refused to approve the 1985 Consent Decree. Pet. Append. at A 8-34. It disagreed with the EEOC's contention that the EEOC was bound to adhere to the terms of the 1983 Consent Decree. Id. at A 15-17. It concluded that, even if the parties were so bound, the court was not obliged "to blind itself to recent court decisions that affect the reasonableness

of the decree." Id. at A 16. It further reasoned that, since a consent decree bears the imprimatur of the court, the court ought not lend its authority to a decree that is not fair, adequate and reasonable. Id. at A 17-20. That determination, it said, "involves balancing several factors including the strength of plaintiff's case; the risk of continued litigation; the presence of a governmental participant; and the amount offered in settlement." Id. at A 20.[4/]

The district court evaluated both the injunctive and monetary relief in the 1985 Consent Decree. It had little quarrel with the adequacy of the

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4/ While the district court noted that the government's participation should be given weight, for numerous reasons, it did not find that factor to be dispositive. Id. at A 18-20.

injunctive relief. Id. at A 20-32. Regarding the monetary award, the court found that, as of August 1985, Pan Am was potentially liable for $26.7 million for back pay alone,[5/] without considering inflation, potential front pay liability, pre-judgment interest or a possible award of liquidated damages,[6/] and that Pan Am

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5/ It found that Pan Am incurred an additional $330,000 of potential liability for salary each month. Id. at A 22. Hence, the additional potential back pay liability is now approximately $4.5 million, for a total of more than $31 million.

6/ The court noted that, as revealed in Thurston, TWA had attempted to comply with the 1978 amendments, had adopted a policy permitting 60 year old pilots in flight engineer status to continue working, and "within months after Congress amended the ADEA, TWA permitted pilots to bid for flight engineer vacancies...." It observed that, "in sharp contrast" Pan Am made no attempt to alter its policy toward pilots until five years after the amendments. Id. at A 23-24.

conceded that its liability could be $20 million. Id. at A 22-24. Whether the proposed installment award of $1.5 million was a fair compromise of claimants' potential recovery, the court concluded, depended upon the strength of the underlying claim. Id. at A 24.

The district court, therefore, carefully analyzed this Court's opinion in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 83 L.Ed.2d 523 (1985), and compared that case's facts to the facts of this case. It found that "Pan Am's policy regarding a pilot's ability to bump a flight engineer seems directly analogous to TWA's." Pet. Append. at A 26. Since this Court found that TWA's policy violated the ADEA, the district court found plaintiff's likelihood of success to be high, and the risk of continued litigation low. Id. at

A 24-29. See also id. at A 27-29, discussing Criswell.[7/] It concluded that the 1985 Consent Decree did not adequately compensate claimants and, accordingly, disapproved it. Id. at A 34.

7/ The district court also found Pan Am's reliance on Johnson v. American Airlines, 745 F.2d 988 (5th Cir. 1984), cert. denied, __ U.S. ___, 105 S.Ct. 3500 (1985), for the proposition that its policy is designed to avoid "command syndrome," and thus constitutes a BFOQ defense, to be misplaced. It noted that Johnson was decided before Thurston, that Thurston held that employers cannot make out a BFOQ defense when, because of age, they deny employees privileges they give to other employees, and that Pan Am permits numerous exceptions to its general policy of preventing senior pilots from flying as flight engineers. It also observed that plaintiffs in Johnson had made no motions for directed verdict or JNOV, which the court of appeals in that case held strictly limited the scope of its appellate review. See Pet. Append. at A 27-29.

E. The Court of Appeals Proceedings and Decision

On November 22, 1985 Pan Am appealed the district court's refusal to enter the consent decree. Again, the EEOC did not appeal. (This fact was not noted by Pan Am in its Petition for Writ of Certiorari.)

The case was argued to the court of appeals on July 17, 1986.[8/] It issued its per curiam opinion, holding that appellate jurisdiction was lacking, just three weeks later, on August 8, 1986.

It held that no appellate jurisdiction existed under 28 U.S.C. § 1292(a)(1) over the district court's interlocutory order as one denying injunctive relief. It held that Pan Am

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8/ The undersigned successfully moved to expedite the appeal.

failed to meet two of the three requirements set by this Court in Carson v. American Brands, Inc., 450 U.S. 79 (1981), for appellate jurisdiction under section 1292 (a)(2). According to the court of appeals, these requirements are:

> First, the interlocutory order must have the practical effect of denying an injunction. Second, the order must have "serious, perhaps irreparable, consequence." Finally, the order must be one that can be "effectively challenged" only by immediate appeal.
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> Pet. Append. at A 4 (citations omitted).

As the court of appeals held with respect to this case:

> Pan Am fails to meet the "denial of injunction" requirement of Carson. Although the disapproved consent decree clearly involved injunctive relief (primarily the modification of Pan Am's cockpit staffing policies), that injunctive relief was sought by the appellee EEOC, not by

> appellant Pan Am. See Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737, 744-45 (1976) (holding jurisdiction lies under section 1292 (a)(1) only if the party taking the appeal was denied injunctive relief).
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> Id. at A 4(-5) (emphasis in original).

The court of appeals also held that Pan Am had failed to meet the "serious, perhaps irreparable, consequence" requirement of Carson. Id. at A 5-6. Unlike the situation in Carson, the district court's refusal to enter the consent decree here did not necessarily force the parties to trial. Disapproval of the 1985 Consent Decree was not on broad grounds that negated all other settlement possibilities. Id. at A 5-6. Pan Am simply was denied the ability to settle the entire action by making inadequate cash payment to the former pilot-claimants. There was no

disapproval of the liability basis or scope of the settlement otherwise. Compare Carson, supra.[9/]

The court of appeals also held that the Carson decision "was clearly intended to provide a definitive basis and standard for such interlocutory appeals" from district court orders disapproving consent decrees. Pet. Append. A 7 n.7. Hence, the court of appeals concluded that Carson, in effect, overruled its earlier decision in Norman v. McKee, 431 F.2d 769, 772-74 (9th Cir. 1970), cert. denied, 401 U.S. 912 (1971), allowing such an appeal pursuant to 28 U.S.C. § 1291 under the "collateral order" doctrine. Pet. Append. A 7 n.7.

9/ The court of appeals found it unnecessary to address the third Carson requirement, "that the order be one that

(Footnote Continued)

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. This Case, Which Involves an Unusual Factual and Procedural Setting, Presents No Significant Or Important Recurring Issue of the Appealability Under 28 U.S.C. § 1291 or § 1292(a)(1) of District Court Orders Refusing to Enter Consent Decrees Or Concerning Any Policy That Favors Voluntary Settlement of ADEA Cases.

A. This Case Presents No Significant or Important Recurring Issue of Law.

The instant case presents an unusual non-recurring situation. Two parties, plaintiff and principal defendant, attempted to settle their lawsuit, not once but twice. Each time they jointly presented their settlement in the form of a consent decree for entry by the district court as a judgment. Each time,

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(Footnote Continued)

can be effectively challenged only on immediate appeal." Id. at A 6 n.6

largely at the instance of former pilots/claimants, the actual fiscal beneficiaries of the plaintiff's claims, the district court rejected the settlement.

The first rejection came because Judge William A. Ingram believed the law was too uncertain for him to evaluate the settlement, as this Court was about to review controlling issues of law in the Thurston case.

Defendant Pan Am appealed, seeking a Ninth Circuit order requiring only that the district court rule on the merits of the proffered settlement. Plaintiff, the EEOC, did not appeal. After this Court decided Thurston, significantly strengthening plaintiff's legal position, Pan Am moved to remand the case to the district court for reconsideration of the

1983 Consent Decree or a modified settlement, in light of Thurston.

After remand, Pan Am and the EEOC proffered a new consent decree that they told the district court was "virtually identical" to the previous one. Indeed, it was in most respects. The EEOC admits that, despite the passage of nearly two years and this Court's decisions in Thurston and Criswell, in renegotiating the settlement it felt constrained only by its agreement to the earlier settlement not to insist on substantial increase in monetary payment to the claimants. See Pet. Append. at A 15-17. Thus, in 1985, a new settlement was reached that adjusted the monetary payments only modestly to compensate for the passage of time. No adjustment was made for the increased value of the former pilots' claims in light of

Thurston and Criswell; and no adjustment was made to take account of the claimants' decreasing likelihood of returning to work as Flight Engineers. Pet. Append. at A 15.

Pan Am and the EEOC again proffered their settlement in the form of a consent decree to the district court for entry as a judgment. They specifically conceded that the standard for the district court's review was whether the consent decree was "an appropriate, fair and just resolution" of the case. Chief Judge Robert F. Peckham, who now was assigned the case, held that it was not. He so ruled after careful consideration of the facts and law, stating his reasons in a careful and thorough opinion. Pet. Append. at A 8-34.

He had little difficulty with the proposed injunctive provisions of the

consent decree. He did not presume to decide the underlying merits of the lawsuit. However, in light of the strong evidence of Pan Am's liability given this Court's Thurston and Criswell decisions, Judge Peckham held that the $1.5 million interest-free installment payments to the claimants was so inadequate as to be unreasonable. Id. at A 34. This was especially so in light of Pan Am's admitted potential exposure for back pay alone of more than $26 million for back pay to the date of the "fairness" hearing alone. And, the district court found Pan AM's potential exposure was in fact much greater, given the strong claims for liquidated double damages and prejudgment interest. Pet. Append. at A 20-29. The EEOC's unwillingness or inability to negotiate for more money for the claimants, and the well founded

objections of more than a majority of the claimants, were additional factors underlying the district court's decision. Id. at A 15-17, A 20-21, A 34.

Pan Am again appealed, this time asserting that the district court abused its discretion in its choice of the standard for reviewing the settlement and in finding that the settlement was too inadequate to accept.

The EEOC again did not appeal. Indeed, before the Ninth Circuit, the EEOC asserted that the district court had not abused its discretion, specifically stating that:

> [W]e are not prepared to say that the district court employed an erroneous standard or erred in ruling that, under any formulation, it must assess the reasonableness of the decree."
>
> Append. hereto at A 16 (citation omitted).

> Though we believe ... the decree we entered was reasonable, we are not prepared to say that the [district] Court's conclusion, reached from a different perspective, amounted to an abuse of discretion.

Id. at A 18.

The facts and circumstances of this case are extremely unlikely to be replicated. Further, this case presents an occasion in which interlocutory appellate review is not likely to lead to a different result. Moreover, this is not a case in which the district court's decision renders further settlement of the case impossible or improbable. Nor is the district court requiring the parties to go ahead to a trial conducted almost certainly according to incorrect legal standards and premises.

In these respects, as well as many others, this case is very different from Carson v. American Brands, Inc., 450 U.S.

79, 87 n.12 (1981). Accord United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980); United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980), aff'd in relevant part and vacated and remanded in part, 664 F.2d 435 (5th Cir. 1981). Compare Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S. ___, 92 L.Ed.2d 405 (1986).

B. The Ninth Circuit's Decision in This Case Makes No In-Roads Into Any Strong Policy Favoring Settlement.

Contrary to Pan Am's argument, given the circumstances of this case, the Ninth Circuit's decision makes no inroad into "Congress' 'strong preference for encouraging voluntary settlement of employment discrimination claims' under Title VII." Local No. 93, 92 L.Ed.2d at

420. (Emphasis added).[10/] This case can still be settled, but not for the plainly

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10/ In its Petition for Writ of Certiorari, Pan Am has made frequent misuse of authorities. Many such instances are elucidated in subsequent arguments. Two other examples are noted here.

As quoted in the Petition, the material language from Local No. 93 quoted in the text immediately above is recited as follows:

> In Local No. 93 v. City of Cleveland, 106 S.Ct. at 3073, this Court reiterated the basis for its holding in Carson: "a District Court's order denying entry of a consent decree is appealable under 28 U.S.C. § 1292(a)(1) because such an order undermines Congress' 'strong preference for encouraging voluntary settlement of employment discrimination claims'" (citation omitted; emphasis added).
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> Pet. at A 16.

The "citation omitted" in the Petition was the phrase "under Title VII." Yet, the instant case arises under the ADEA, not Title VII. And, Pan

(Footnote Continued)

inadequate monetary relief offered by Pan Am.

(Footnote Continued)

Am cites no authority concerning a strong policy promoting voluntary settlement of ADEA claims. Assuming such policy exists -- and we do not necessarily say it should not -- the ADEA also includes an especially strong policy favoring monetary make-whole remedies for claimants. After all, for many ADEA claimants, money, rather than injunctive relief, is all the relief they can anticipate, given their rapidly diminishing employment opportunities. See, e.g., Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435 (11th Cir. 1985), reh. denied; Cancellier v. Federated Department Stores, 672 F.2d 1312, 1319-20 (9th Cir.), cert. denied, 459 U.S. 859 (1982); Gabrielle v. Chrysler Corp., 573 F.2d 949, 954 (6th Cir. 1978).

For another egregious misuse of authority, compare the Petition at 7 n. 8 with the EEOC's correct analysis of certain cases, Append. hereto at A 17-18 n.9. Accord Pet. Append. at A 19.

II. The Ninth Circuit's Holding That Appellate Jurisdiction Is Lacking Under 28 U.S.C. § 1292(a)(1) Does Not Conflict With the Decision of This Court in Carson Or With Any Post-Carson Decisions In Other Circuits.

A. The Ninth Circuit's Decision Does Not Conflict With This Court's Carson Decision.

Contrary to Pan Am's arguments, Pet. at 10-21, the Ninth Circuit's holding in this case does not conflict with this Court's decision in Carson v. American Brands, Inc., 450 U.S. 79 (1981). The Ninth Circuit's analysis of Carson is impeccable. See Pet. Append. at A 3-7. Further, it is clear that section 1292(a)(1) ordinarily does not authorize immediate appeal of interlocutory orders that merely delay, but do not finally adjudicate, claims for injunctive relief. Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc., 385 U.S. 23

(1966), cited in Carson, supra, 450 U.S. at 84.

Pan Am can show only that the district court's order refusing to enter the 1985 Consent Decree has the practical effect of delaying an injunction under the ADEA to plaintiff EEOC. The EEOC has not appealed. And, unlike the situation in Carson, the district court has not precluded the EEOC from securing its injunction hereafter; nor has it precluded Pan Am from securing its secondary injunction against collective bargaining agents.

Thus, as the court of appeals held here, Pan Am cannot even show that it will suffer irreparable harm if immediate review is denied. See In re Feit & Drexler, Inc., 760 F.2d 406, 412 (2d Cir. 1985). Unlike the appealing party in

Carson, it has not even lost the right to settle this case without a trial.

Even assuming, arguendo, that Pan Am has irretrievably lost the opportunity to settle this case without a trial, the delay and additional expense associated with a trial do not themselves constitute the kind of irreparable harm necessary to make an immediate appeal available under Carson. See United States v. Western Electric Co., 777 F.2d 23, 30 (D.C. Cir. 1985); Sentry Life Ins. Co. v. Borad, 759 F.2d 695, 698 (9th Cir. 1985). Cf. Federal Trade Com'n v. Standard Oil Co., 449 U.S. 232, 244 (1980).

B. This Case Presents No Conflict Among the Circuits As to Appellate Jurisdiction Under 28 U.S.C. § 1292(a)(1) Or the Meaning of This Court's Decision in Carson on That Subject.

Contrary to Pan Am's arguments, the Ninth Circuit's decision also does not conflict with the decisions of other Circuits as to the meaning of Carson or to the availability of appellate jurisdiction under section 1292(a)(1). In making its argument for a conflict among the Circuits, Pan Am cites only In re International House of Pancakes Litigation, 487 F.2d 303 (8th Cir. 1973) (see Petition at 8 n.9 and 10), and Donovan v. Robbins, 752 F.2d 1170 (7th Cir. 1985) (see Petition at 8, 10 and 14). Neither case evidences a conflict with the Ninth Circuit's decision or reasoning in this case.

Pan Am's reliance on the International House of Pancakes decision cannot be taken seriously. As this Court observed in Carson, 350 U.S. at 823 n.6, there was "no discussion of [the] jurisdictional question" in International House of Pancakes. In fact, that decision -- all of a single page long -- does not reveal whether the appellate jurisdictional issue was even raised or contemplated, or whether jurisdiction was exercised under section 1292(a)(1) or section 1291. The opinion was a kind of afterthought justifying a summary affirmance of the district court's refusal to enter a settlement. Surely that cryptic pre-Carson decision (cited in Carson as a "see also" case, ibid.) cannot now be relied upon as establishing

a conflict between the Eighth and Ninth Circuits now, after Carson. 11/

Pan Am's reliance on Donovan v. Robbins, 752 F.2d 1170 (7th Cir. 1985) to demonstrate a conflict among the Circuits is equally unavailing. The circumstances of this case and Donovan are so different as to belie Pan Am's contention that "the Ninth Circuit's reasoning therefore conflicts with that of the Seventh Circuit." Pet. at 10.

In Donovan, which involved an ERISA dispute, the district court rejected a settlement in the form of a consent

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11/ Pan Am makes much of the fact that, like here, the defendant in International House of Pancakes appealed the refusal of the consent decree. Pet. at 8 n.9. Nothing in the decision reveals whether the settling plaintiffs, as here, opposed the appeal, or whether the district court's refusal of the consent decree denied defendant or plaintiffs injunctive relief.

decree reached by the plaintiff, the United States Secretary of Labor, and some of the defendants, current trustees of an employee benefit fund. The consent decree included injunctive and monetary provisions. Other defendants objected to the settlement, and the district court rejected it.

Unlike the circumstances of the present case, the appeal was by both the settling defendants and the plaintiff, the Secretary of Labor, who would have benefited from the injunction.

The Seventh Circuit concluded that it had appellate jurisdiction, in that the rejection of that consent decree in Donovan satisfied all the Carson requirements: (1) denial to the appealing parties of the benefits of an injunction, 752 F.2d at 1172-74; (2) the existence of serious irreparable injury

which would justify entry of a preliminary injunction, 752 F.2d at 1173-76; and (3) the need for immediate appeal to avoid mootness, in that delay might keep unchallenged aspects of the settlement from holding together, 752 F.2d at 1176 (by implication).

The circumstances here are very different. First, Pan Am, the only appellant here, has not been denied an injunction within the meaning of section 1292(a)(1); the EEOC, a non-appealing party, has been denied an injunction temporarily. Second, Pan Am certainly is not suffering irreparable injury of the type that would justify entry of a preliminary injunction. It simply is being denied the benefits of a cheap settlement. Third, here, Pan Am will be able to appeal if it loses after any trial and the district court denies

it injunctive relief against ALPA and FEIA. Given these differences, there is no conflict, even in reasoning, between the Donovan decision and the Ninth Circuit's decision here.

III. The Ninth Circuit's Holding That Appellant Is Lacking Under the Collateral Order Doctrine of 28 U.S.C. § 1291 Does Not Present a Significant Or Important Recurring Issue Concerning the Appealability of District Court Orders Refusing To Enter Consent Decrees, and There Exists No Conflict Among The Circuits on That Issue.

A. This Case Presents No Significant or Important Recurring Issue of Law Concerning Appellate Jurisdiction Under 28 U.S.C. § 1291.

The collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), and 28 U.S.C. § 1291 simply is not available to Pan Am in this case. To fall within this "narrow exception" to the finality rule,

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981), "an order must at a minimum satisfy three conditions: It must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.'" Richardson-Merrell, Inc. v. Koller, 472 U.S. ___, 86 L.Ed.2d 340, 346 (1985). The district court order that Pan Am seeks to appeal does not pass muster under this three-part test.

Because the district court's disapproval of the consent decree does not foreclose the parties' options "to proceed with the litigation, or to propose a different settlement," Seigal v. Merrick, 590 F.2d 35, 37 (2d Cir. 1978), there clearly has been no "complete, formal and, in the trial

court, final rejection" of any claimed right, Firestone, supra, 449 U.S. at 376. Moreover, the only possible "right" Pan Am can claim here is the "right" to end this litigation on terms it finds comfortable, over the objections of large numbers of the ADEA claimants. No such "right" exists. "[T]he expense and annoyance of litigation is part of the burden of living under government." Federal Trade Com'n v. Standard Oil Co., 449 U.S. 232, 244 (1980).

Nor could Pan Am demonstrate the requisite complete severability of the issue on appeal from the main case. As the district court recognized in this case (Pet. Append. at A 20), a court presented with a proposed consent decree for its approval must consider, among other factors, the strength of the parties' respective claims and defenses

as they appear at the time the decree is considered. See Officers for Justice v. Civil Service Commission, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983). This issue is the central one to be tested at trial. As the Second Circuit observed in Seigal v. Merrick, supra, 590 F.2d at 38, for purposes of section 1291, because "an approval of a compromise ... becomes a final judgment," "a disapproval of a compromise ... is not different from a denial of summary judgment or the grant of a new trial" which are not appealable orders. (Emphasis in original.)

The Ninth Circuit properly read this Court's decision in Carson (see Pet. Append. at A 6-7 n.7) as overuling sub silentio the Ninth Circuit's earlier decision in Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), cert. denied, 401 U.S.

912 (1971), which had held that certain orders disapproving consent decrees are immediately appealable collateral orders under 28 U.S.C. § 1291. Carson and the other recent cases discussed above had drained Norman of its vitality.

Norman had used the flexible, pragmatic approach to the Cohen doctrine epitomized in Gillespie v. United States Steel Corp., 379 U.S. 148, 152-54 (1964), that, in the past decade, this Court repeatedly has rejected, in the Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 n.30 (1978), Firestone, supra, and Richardson-Merrell, supra, decisions, among others, in favor of a rigorous application of the three-part test described above to preserve the longstanding federal judicial policy against piecemeal appellate review.

Further, since this Court's decision in Carson provides for interlocutory appeals of many (probably most) district court orders refusing to enter consent decrees under section 1292(a)(1), the question of availability of section 1291 jurisdiction hardly raises a significant or important recurring question of law.

B. This Case Presents No Current Conflict Among the Circuits Concerning Appellate Jurisdiction Under 28 U.S.C. § 1291.

Pan Am's contends, despite the Ninth Circuit's rejection of its own earlier decision in Norman, that a conflict now exists among the Circuits on the question of section 1291 appellate jurisdiction over orders refusing to enter consent decrees. Pet. at A 18-21. Pan Am's position is perverse. The only conflict Pan Am cites among the Circuits on this

subject is the supposed conflict between the Ninth Circuit's 1970 decision in Norman and the Second Circuit's 1978 decision in Seigal. Both cases pre-date Carson (1981), and were cited in it to evidence a conflict existing among Circuits at the time Carson was decided. They hardly demonstrate a present conflict among the Circuits on the issue. Indeed, the Ninth Circuit's decision in this case now squares its approach with that of the Second Circuit in Seigal. Hence, Pan Am has shown no conflict between those Circuits.

CONCLUSION

For all of the foregoing reasons, Pan Am's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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DATED: October 27, 1986

A P P E N D I X

[FILED MAR 6, 1984]

IN THE UNITED STATES DISTRICT
NORTHERN DISTRICT OF CALIFORNIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. PAN AMERICAN WORLD AIRWAYS, INC., et al., Defendants.	NO. C-81-3636-WAI O R D E R
AND RELATED CROSS AND THIRD PARTY ACTIONS.	

On September 28, 1983, a hearing was held in this court to entertain objections to a consent decree proposed by plaintiff EEOC and defendant Pan Am in this action brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq., ("ADEA"). During the hearing, defendant/intervenor Flight Engineers International Association, National Airlines Chapter,

("NALFEIA") orally moved to dismiss this action on the grounds that the EEOC lacks authority to maintain the suit.

All parties who have made general and limited appearances have now had opportunity to address both the issues raised by the motion to dismiss and the merits of the proposed consent decree. For reasons herein, the court finds that the EEOC has the authority to bring this action, and the motion to dismiss is accordingly DENIED. The court also finds that the proposed consent decree cannot be entered at this time and is accordingly DISAPPROVED.

I. MOTION TO DISMISS: EFFECT OF CHADHA

NALFEIA has contended that the EEOC lacks the authority to initiate lawsuits to enforce the ADEA because the legislation which transferred to the EEOC its authority to do so contains an

invalid legislative veto. They rely upon the recent case of Immigration and Naturalization Service v. Chadha, __ U.S. __, 103 S.Ct. 2764 (1983), wherein the Supreme Court held unconstitutional a section of the Immigration and Nationality Act, at 8 U.S.C. § 1105a(a), which had authorized either body of Congress to invalidate the U.S. Attorney General's decision to allow an otherwise deportable alien to remain free from deportation. Id. at 2788. The Court held that the veto exercised by the House of Representatives ran afoul of the constitutional mandates of bicameral consideration and presentment. The Court found only the severable one-House veto provision unconstitutional, not the entire act.

NALFEIA also cites EEOC v. Allstate Ins. Co., 570 F.Supp. 1224 (D.C. S.D.

Miss. 1983), U.S. App. Pending, Dec. 15, 1983, 52 U.S.L.W. 3512, where the court found unconstitutional the entire Reorganization Act of 1977, 5 U.S.C. § 901 et seq., (the "Act"), which, by way of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, had transferred to the EEOC the power to litigate ADEA suits. In sum, NALFEIA contends that Chadha and Allstate mandate that this court lacks subject matter jurisdiction and must dismiss this action. See, e.g., Pressroom Unions-Printer League Income Security Fund v. Continental Assurance Co., 700 F.2d 889 (2d Cir.), cert. denied, __ U.S. __, 52 U.S.L.W. 3264 (Oct. 3, 1983).

EEOC's opposition is four-pronged: 1) defendants each lack standing to challenge the EEOC's power to sue; 2) the legislative veto provision of the Act is

severable from the remainder of the Act; 3) the veto problem has been cured by subsequent legislative ratification; and 4) Chadha should not be applied retroactively.

EEOC argues especially that, because the legislative veto in the Act was not exercised, movants have suffered no injury in fact. The court finds this reading of Article III's standing requirements is incorrect.

Movants standing is determined by whether they have suffered some actual or threatened injury fairly traceable to the challenged action which is likely redressable. See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, __ U.S. __, 102 S.Ct. 752, 758 (1982), and cases cited therein. The injury in fact herein is not the result of the legislative veto

provision. It is the harm to defendants and intervenors that is threatened by this lawsuit with respect to at least the issue of "rightful place seniority" relief and the burden to be born by parties in this matter who are not the alleged victims of age discrimination.

Regarding Congress' failure to exercise the veto, Congress is bereft of authority once delegated, and "until that delegation is legislatively altered or revoked ...." Chadha, supra, 103 S.Ct. at 2786. Hence, in this this context, the mere inclusion of a clause giving Congress the ability to avoid constitutional mandate is unconstitutional and the court is satisfied that said parties may therefore challenge it.

While there has been no argument set forth to support the continuing viability

of the one-House veto of the Act in light of Chadha, this court does not believe the entire Act is invalid as a result. The question is whether Congress would have enacted the Act in the absence of the invalid veto provision. See Consumer Energy Council v. Federal Energy Regulatory Comm'n., 673 F.2d 425, 442 (D.C. Cir. 1982), aff'd., __ S.Ct. __, 51 U.S.L.W. 395 (June 28, 1983).

The inclusion of a one-House veto in this case is obvious: to restrict the President's ability to alter Congress' reorganization plans which were designed to streamline the powers of administrative agencies. However, there is no conclusive evidence to be drawn from the Congressional Record concerning the importance of the vet to the Act. The record contains a statement by Rep. Drinan that "[t]he one-House veto

provision is deemed to be an integral and necessary part of the legislative scheme for reorganization. That is a proposition to which all agree. H.R. Rep. No. 95-105, 95th Cong., 1st. Sess., reprinted in 1977 U.S. Code Cong. & Ad. News 41, 69 ("H.R."). The record also contains statements by Rep. Brooks which acknowledged the confrontation between the questionable constitutionality of the veto and Congress' concern for maintaining control over reorganization, apparently favoring the latter. 123 Cong. Rec. at 9344.

While the court is inclined to conclude from the record that the import of the Act in toto was great enough such that it would have been enacted absent the veto provision, the court agrees with the conclusion reached by Judge Horton, in Muller Optical Company, et al. v.

EEOC, No. 83-2836 H, (W.D. Tenn. Nov. 10, 1983), that the court's decision herein should also rest on the conclusion that Congress had ratified the transfer of authority to the EEOC by subsequent legislation and legislative references.

Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 301-302 (1937), provides that Congress may ratify the President's unauthorized acts by passing appropriate legislation or by making confirmatory references to such acts in subsequent legislation.

Here, two recent duly passed appropriations acts support EEOC's position, in that they indicated the beneficiary of the funds was the enforcement (by the EEOC) of the ADEA and Title VII. Pub. L. No. 97-377, 96 Stat. 1830, 1874 (1982) (ADEA and Equal Pay Act); Publ. L. No. 97-92, 95 Stat. 1192

(1981) (Title VII). There is also an implication, albeit somewhat tenuous, that Congress had ratified the ADEA enforcement authority transfer to the EEOC by leaving it unaffected by the Civil Service Reform Act of 1978, 5 U.S.C. § 1101 note (Supp. IV 1980), which superseded other parts of Reorganization Plans Nos. 1 or 2 of 1978.

The counter-argument is exemplified by Greene v. McElroy, 360 U.S. 474 (1959), wherein the Supreme Court apparently declined to find congressional ratification in areas of "questionable constitutionality," which, in that case, concerned due process rights of persons processed for security clearances. Id. at 506-507. Subsequent cases rejecting ratification have also held that general appropriations bills may not, under certain circumstances, constitute

ratification. See Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978); Andrus v. Sierra Club, 442 U.S. 347 (1979).

The instant case is readily distinguishable. There is no due process issue or aspect of present questionable constitutionality regarding the mere transfer of authority from one executive agency to another. Further, there is no issue of general appropriations as constituting proposed legislation.

Accordingly, the court accepts the contentions of the EEOC regarding severability of the one-House veto from the Act, leaving the balance of the Act in full force and effect, and the subsequent ratification of Reorganization Plan No. 1 of 1978. On this basis, and pursuant to the authority cited herein, the motion to dismiss is hereby DENIED.

II. CONSENT DECREE

The issue in this case is whether Pan Am intentionally discriminated against pilots and co-pilots over age 60 by denying them an opportunity, equal to that of those under age 60, to down-bid for flight engineer positions. A fundamental reason asserted by the EEOC and by Pan Am in support of the proposed settlement at this point is the uncertainty of law regarding this issue.

This Circuit has provided some direction, see Criswell v. Western Air Lines, etc., 514 F.Supp. 389, aff'd., 709 F.2d 544 (9th Cir. 1983). However, in light of the recent Supreme Court position on the same issue, Air Line Pilots Association v. Trans World Airlines, 713 F.2d 940 (2d Cir.), cert. granted, No. 83-997, Feb. 24, 1984, the court is reluctant to venture into

uncharted waters by approving of the proposed settlement at this time.

Accordingly, the consent decree is hereby DISAPPROVED. The parties are requested to refrain from filing further pleading or memoranda pending the imminent reassignment of this case to another Northern District court.

DATED: 3 6 84

/William A. Ingram
WILLIAM A. INGRAM
United States District Judge

EXCERPT FROM PAGES 12-14, 18
OF EEOC BRIEF IN THE NINTH CIRCUIT

... We believe that the best formulation is that set forth in City of Alexandria, discussed above.8/ Although it is

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8/ Pan Am's position on this issue is less than crystalline. On the one hand, it suggests that the district court must approve such a decree absent evidence of fraud, collusion or unlawful provisions in the decree (br. at 20); on the other, it cites City of Alexandria. (br. at 20 n. 13). It also relies on U.S. v. Hooker Chemicals & Plastic Co., 607 F.Supp. 1052, 1057 (W.D.N.Y. 1985), holding that "the function of the reviewing court is ... to assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable or against public policy," and on U.S. v. Ketchikan Pulp Co., 430 F.Supp. 83, 86 (D. Alaska 1977), which specifically rejected the notion that the court should approve the decree unless it finds the agency guilty of bad faith or malfeasance. Pan Am also suggests that "because the objecting claimants' right to bring ADEA action was terminated when the EEOC filed suit, this case is no different than an action brought by any other federal agency,"
(Footnote Continued)

arguably no more than the inverse of the "fair, reasonable and adequate standard" (See United States v. City of Miami, 664 F.2d 435, 440-41 (5th Cir. 1981) (en banc)), it seems to us more effectively [sic] to remind the trial court that its role is limited and that a consent decree proposed by EEOC "carries with it a presumption of validity."

However, the district court here cited City of Alexandria with approval, as a standard to guide it. It also stated that its role was not to resolve the merits of the underlying dispute and recognized the preference for voluntary settlements and the deference to be accorded the government's participation,

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(Footnote Continued)

citing SEC v. Randolph, 736 F.2d at 529 and Marshall v. Holiday Magic, 550 F.2d at 1178. (Pan Am Br. 24-25).

under the law of this Circuit. (C.R. 395 at 14-15). Although we would urge this Court to adopt the City of Alexandria formulation, we are not prepared to say that the district court employed an erroneous standard or erred in ruling (C.R. 395 at 14; E.R. 259) that, under any formulation, it must assess the reasonableness of the decree.[9/]

9/ To the extent that Pan Am is arguing that a trial court must conclusively presume that an ADEA decree entered into by the government is fair, adequate and reasonable, because claimants "have no right to object" (Pan Am br. at 21-28) in such actions once the government has brought suit, we disagree. In the first place, a consent decree is an adjudication (see supra n.14) and courts cannot be expected to blindly lend their authority to acts of the parties -- even where one is the government.

Moreover, although Pan Am correctly notes that courts have usually declined to let claimants intervene as parties in ADEA or FLSA actions (Pan Am br. at

(Footnote Continued)

* * * *

(Footnote Continued)

17-19), many--including some of those on which Pan Am relies--have permitted at least limited participation, as the district court did here. E.g., EEOC v. Boeing Co., ____ F.Supp. ___, 37 FEP Cases 1657 (W.D. Wash. 1985). Indeed, the D.C. Circuit Court, in an unpublished opinion (see attachment), reversed the district court's refusal to permit intervention in Marshall v. U.S.P.S., 481 F.Supp. 1037 (D.D.C. 1979).

Only EEOC v. Consolidated Edison Co., 557 F.Supp. 468 (S.D.N.Y. 1983), provides any support for the proposition that ADEA claimants have a lesser right to object to decrees entered into by the government than do other claimants, and even there there is a suggestion that the court was influenced by its belief that the claimants had little likelihood of success on the merits. Id. at 474. EEOC v. Eastern Airlines, 97 F.R.D. 646 (S.D. Fla. 1983), appeal dismissed, 736 F.2d 635 (11th Cir. 1984), on which Pan Am relies, actually refutes Pan Am's argument. We agree with the district court (C.R. 395 at 16; E.R. 26) that the court there based its refusal to permit intervention primarily on its finding that EEOC's representation was manifestly adequate in that the decree itself was fair, adequate and reasonable, and not, as Pan Am suggests (br. at 24 n. 16) that

(Footnote Continued)

Though we believe, for the reasons stated above, that the decree we entered was reasonable, we are not prepared to say that the [district] court's conclusion, reached from a different perspective, amounted to an abuse of discretion. ...

(Footnote Continued)

"by statute, EEOC was an adequate representative."

Supreme Court, U.S.
FILED
OCT 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-525

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

AND RELATED CROSS AND THIRD PARTY ACTIONS.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NAL CHAPTER, FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, IN OPPOSITION

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BRIEF OF THE NAL CHAPTER, FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION, IN OPPOSITION

RESPONDENT'S STATEMENT OF INTEREST IN THE CASE

Respondent NAL Chapter, Flight Engineers International Association was one of the parties granted a limited right of intervention in the district court in 1983. Pet. 1 & n.3; Pet. App. A2 & n.3; Pet. App. A12, A30-

A31. Prior to the 1980 acquisition of National Airlines by Pan American World Airways, the NAL Chapter had been the exclusive bargaining representative for all National Airlines flight engineers. At the time of the Pan Am-National merger, the integration of the two airlines' cockpit crew seniority lists and bidding structures became the subject of an arbitration proceeding which culminated with the March 12, 1981, final and binding Award of Arbitrator Lewis M. Gill.

In pertinent part, Mr. Gill's Award provided, in essence, that each pre-merger airman group would exercise on the merged Pan Am the same range of bidding options as had been available to the respective groups prior to the merger. As a result, pilots and flight engineers who came to Pan Am by virtue of the National merger continue to be eligible to bid only pilot (that is, captain and first officer) positions or only flight engineer positions; no former National flight engineer may hold a pilot position, and no former National pilot may hold a flight engineer position. Pre-merger Pan Am airmen continue to exercise the same bidding rights for all three cockpit crew positions as they had on Pan Am prior to the merger.

Since the effective date of the Pan Am-National merger, the bargaining representative for all Pan Am flight engineers, including those from National Airlines, has been the PAA Chapter, Flight Engineers International Association. Under the terms of agreements between the PAA Chapter and the NAL Chapter, the NAL Chapter has continued to represent the distinct interests of former National Airlines flight engineers in those limited areas where the National engineers' interests are not congruent with those of the former Pan Am engineers.

The consent decrees proposed in this case presented one such area. The injunctive provisions in those decrees would require Pan Am to provide flight engineer

positions to a class of retired Pan Am pilots, and, prospectively, to all Pan Am pilots[1] as they reach the age at which federal regulations prohibit their continued employment as air transport pilots. *See* Pet. 3; 14 C.F.R. § 121.383(c). Because the NAL Chapter believed that the injunctive relief provided in the consent decrees would impermissibly damage the career expectations and employment security of former National flight engineers, the NAL Chapter sought and was granted leave to intervene for the purpose of opposing the consent decrees in the district court.

On Pan Am's appeal from the district court's disapproval of the second consent decree, the NAL Chapter challenged the court's appellate jurisdiction, and filed a brief addressed only to the jurisdictional issue. In the decision Pan Am now asks this Court to review, the court of appeals adopted the arguments put forth by the NAL Chapter. The NAL Chapter therefore believes it is obliged to respond to the petition which calls that decision into question. The NAL Chapter continues to believe that the relief proposed in the rejected decrees would impermissibly impinge upon the legitimate employment expectations of former National flight engineers. The present petition raises no issue bearing on those concerns, however, and they therefore require no further discussion here.

REASONS FOR DENYING THE WRIT

In the decision petitioner asks this Court to review, the court of appeals refused to elevate to the level of "serious, perhaps irreparable, consequence," *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955), petitioner's failure to secure district court approval of a proposal to settle this case on terms petitioner found

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[1] No such right would be extended to former National pilots under the proposed decrees.

commodious. Petitioner's claim (Pet. 10-15) that the court of appeals' analysis runs directly afoul of this Court's decision in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), reflects a fundamental misunderstanding of *Carson*. The claim depends upon the unprecedented proposition that an employer charged with unlawful age discrimination has an enforceable right to compromise and settle that claim, even though the trial court has found that the terms of the proposed settlement do not sufficiently effectuate the remedial purposes of the statute involved. Nothing in *Carson* suggests that defendants have the same rights to secure inferior settlements of employment discrimination suits as plaintiffs have to secure, by settlement where possible, fully adequate settlement of such claims. *Carson* held only that a district court's denial of the latter right may, under some circumstances, be reviewed on appeal under 28 U.S.C. § 1292(a)(1), and the court of appeals quite correctly declined petitioner's invitation to impute to *Carson* a concern for the former claim of right as well. Because the court's decision is fully consistent with *Carson*, and because no other court of appeals has, upon consideration of the arguments petitioner now advances, taken a different view, there is no occasion for this Court to examine the court of appeals' decision. The petition should therefore be denied.

1. In *Carson*, a Title VII suit[2] alleging employment discrimination on account of race, plaintiffs had successfully negotiated a class settlement under the terms of which the defendants agreed to implement certain systemic, remedial measures intended to combat the ongoing effects of the employer's past discrimination. In particular, the employer had agreed

> to give hiring and seniority preferences to black employees and to fill one-third of all supervisory

[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

> positions in the Richmond Leaf Department with qualified blacks.

Carson, 450 U.S. at 81.

Believing that the affirmative relief the consent decree would have provided was itself unlawful, the district court refused to approve the decree. The district court informed the parties, moreover, that even if plaintiffs were to succeed at trial in demonstrating that the employer's past practices had been unlawful, it would order only individual, victim-specific relief; the court made clear that it would not order the sort of class-wide affirmative relief which the consent decree had contemplated.

This Court held that the district court's merits-based rejection of the affirmative remedial relief plaintiffs had sought, and the employer had agreed to provide, effectively denied to plaintiffs

> the injunctive benefits of the settlement agreement they negotiated.

Id. at 89. Because the district court had made clear that no such broad-based injunctive class relief would be available in that court, the Court concluded that

> any further delay in reviewing the propriety of the District Court's refusal to enter the decree might cause [plaintiffs] serious or irreparable harm (footnote omitted).

Id. Noting that plaintiffs' complaint had sought both preliminary and permanent injunctive relief, and had alleged that the denial of injunctive relief would cause them irreparable harm, *id.* at 89 & n.15, the Court concluded that the district court's order was one which might have caused plaintiffs to suffer irreparable harm, and thus was immediately appealable under 28 U.S.C. § 1292(a)(1).[3]

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[3] The Court's conclusion that perpetuation of the racially discriminatory employment practices present in *Carson* might cause

Petitioner's interest in this case is of a wholly different character from the plaintiffs' interests implicated in *Carson*. First, and most obviously, petitioner's interest—that of an employer whose employment practices have been challenged as unlawful—is a private one. Unlike the claims of the *Carson* plaintiffs, petitioner's claim is in no sense pressed to "vindicat[e] a policy that Congress considered of the highest priority (footnote omitted)." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). Instead, petitioner's interest in pursuing the settlement which the district court disapproved is a privately-motivated, wholly defensive one which must be presumed to arise from its judgment that the terms of that settlement are, from its perspective, quite favorable.[4]

Furthermore, while it is true that petitioner joined the EEOC in the motion for entry of the consent decree, there is no sense in which petitioner sought and was refused injunctive relief within the meaning of section 1292(a)(1). The only prayer for injunctive relief asserted by any party was the prayer for a permanent injunction in EEOC's complaint. The permanent injunction which EEOC sought would have run against "Pan Am, its officers, agents, employers, successors, assigns and all persons in active concert or participation with it" (Third Amended Complaint, p. 4). Not surprisingly, the injunctive provisions in the rejected consent decree tracked the

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plaintiffs irreparable harm reflects the legislated priority, embodied in Title VII, assigned to the elimination of such practices. Indeed, some courts have concluded that "irreparable injury should be presumed from the very fact that [Title VII] has been violated." *United States v. Hayes International Corp.*, 415 F.2d 1038, 1045 (5th Cir. 1969).

[4] The district court believed petitioner's potential financial liability to the class of retired pilots in whose interest EEOC brought the action might conservatively be estimated at $26.7 million. Pet. App. A22. The cash settlement rejected by the district court—$1.5 million—thus would have represented payment of less than six cents per dollar of potential liability.

injunctive relief for which EEOC prayed in its complaint.[5] Petitioner's joining of the motion for approval of the decree thus represented no more than its acquiescence to the entry of a permanent injunction against it. Under these circumstances, there is no sense in which the district court's refusal to approve the decree "truly denies Pan Am injunctive relief." Pet. 10.[6]

Nor is there any sense in which petitioner can show that the district court's action threatens it with irreparable harm, as *Carson* requires to establish appellate jurisdiction under section 1292 (a) (1). The "irreparable consequence" element of the *Carson* analysis is the touchstone for determining whether an order refusing injunctive relief

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[5] Both petitioner and the EEOC informed the court of appeals on brief that the injunctive provisions in the proposed decree provided all the injunctive relief sought in the complaint. *See* Brief of EEOC at 16; Reply Brief of Pan American at 16. Unlike the monetary relief which the district court found insufficient, the burden of the injunctive relief proposed fell not on petitioner, but on incumbent flight engineers.

[6] Petitioner's lame reliance on its cross-claims against the unions to show that it was refused injunctive relief is clearly unavailing. Any need petitioner may have expressed for relief against the unions was contingent upon the entry of injunctive relief against petitioner. As the court of appeals explained, Pet. App. A4-A5, petitioner did not seek and does not require any modification of its cockpit collective bargaining agreements until such time as a court requires it to take actions which are inconsistent with those agreements. Because no such order has been entered, petitioner has not been refused the relief it conditionally sought against the unions.

Moreover, the nature and extent of any protection petitioner may require in this regard cannot be determined until the nature and extent of any injunctive relief awarded to the EEOC is determined. Because *that* decision has not yet been made, the district court's refusal separately to enjoin the unions (an action petitioner never suggested) is clearly an "[o]rder[] that in no way touch[es] on the merits" of petitioner's claim for relief against the unions. *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966).

> has the same effect ("serious, perhaps irreparable, consequence," in the language of an earlier case) as the denial of a preliminary injunction.

Donovan v. Robbins, 752 F.2d 1170, 1174 (7th Cir. 1985).

Petitioner attempts, Pet. 14, to satisfy this test by asserting that it

> will be forever foreclosed from settling on the terms provided for in the consent decree and forced to trial.

There is, we submit, no "right" guaranteeing that an employer whose practices are challenged as being in violation of federal law will not be "forced to trial." As this Court has aptly observed,

> [t]he expense and annoyance of litigation is part of the social burden of living under government.

Federal Trade Commission v. Standard Oil Co. of California, 449 U.S. 232, 244 (1980), *quoting Petroleum Exploration, Inc. v. Public Service Comm.*, 304 U.S. 209, 222 (1938); *United States v. Western Elec. Co.*, 777 F.2d 23, 30 (D.C. Cir. 1985). Nor, we think, do defendants in employment discrimination cases enjoy any "right" to compromise such challenges on terms which they find favorable. The statutes under which such cases are brought are remedial in nature, designed to protect classes of employees and potential employees from the adverse consequences of illegal employment discrimination. The analysis by which the Court in *Carson* concluded that the plaintiff class was threatened by irreparable harm obviously reflects the remedial character of the statute under which the *Carson* plaintiffs claimed. To suggest, as petitioner does, that an identity of interest exists between plaintiffs in employment discrimination cases who seek to enforce rights created by these remedial statutes, and defendants who are charged with violating them, is to ignore the very purposes for which the statutes were enacted. Plaintiffs have a legally protectable right to be free from the prohibited types of discrimina-

tion, and to be made whole for any harm such discrimination causes them. Employers such as petitioner, on the other hand, obviously are not among the classes of persons for whose benefit these statutes were enacted; they are, instead, obliged by those laws to eliminate the practices the statutes prohibit, and to make good any losses their employees have suffered because of the prohibited practices. Such employers do not have any statutorily-protected right to compromise such claims, or to insulate themselves from whatever costs and burdens their compliance with the law may require. Thus petitioner's loss of the opportunity to settle this case for a small fraction of its potential liability is just that—a lost opportunity. It does not represent a loss of right or entitlement of any sort, and it cannot constitute the sort of harm or threatened harm for the prevention of which section 1292(a)(1) created the "limited exception to the final-judgment rule," *Carson*, 450 U.S. at 84. The court of appeals' rejection of petitioner's appeal was thus fully consistent with *Carson*, and need not be disturbed by this Court.

2. Petitioner's claims (Pet. 8, n.9, 10-11, 18-21) that the decision of the court of appeals presents conflicts among the circuits is readily rebutted. The only one of the cases petitioner cited in which appeal was taken by a defendant and opposed by the plaintiff is *In re International House of Pancakes Franchise Litigation*, 487 F.2d 303 (8th Cir. 1973). In that case, however, appellee moved for summary affirmance before any briefs were filed, and the court of appeals granted that motion. The court's brief reported opinion affirming that summary disposition reflects no consideration of the question of appellate jurisdiction. Presumably because no party raised the question of jurisdiction, and because summary affirmance made it unnecessary in any event further to consider the merits of the appeal, the court apparently did not believe the issue merited separate attention. The

decision can, under these circumstances, hardly be said "squarely [to] conflict[]," Pet. 8-9, n.9, with the decision below. Nor can the question of whether a defendant has standing under *Carson* to maintain an appeal accurately be characterized as a "recurring" one, Pet. 9, n.9, given petitioner's inability to locate any other reported consent decree decision in which the defendant's appellate standing was an issue.

The only other cases petitioner cites in purported demonstration of an important conflict are cases in which the plaintiff appealed the district court's disapproval of the decree. *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1985) (appeal by plaintiff Secretary of Labor and settling defendants); *Santana v. Collazo*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984) (before *Carson*, plaintiffs had attempted to appeal from district court refusal to approve consent decree). As in *Carson*, moreover, the courts' refusal to approve the decrees in both *Donovan* and *Santana* resulted from merits determinations which operated to deny to appealing plaintiffs the benefits of the injunctions to which defendants had agreed. *See Donovan*, 752 F.2d at 1178 (district court's "analysis rests on a (thoroughly understandable) misconception of the confused and confusing law of contribution"), and *Santana*, 714 F.2d at 1174 (district court rejected proposed decrees as unduly "disruptive of the Commonwealth's juvenile justice system"). Both *Donovan* and the decision below are entirely consistent with *Carson* and with one another, as is the *Santana* court's regret that plaintiff's earlier appeals in that case had been dismissed.

Petitioner finally claims that the decision below presents a conflict over the proper construction of the "collateral order" doctrine under 28 U.S.C. § 1291.[7] The

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[7] Petitioner did not identify 28 U.S.C. § 1291 as a basis for invoking appellate jurisdiction in its docketing statement in the

conflict upon which petitioner relies, however, was resolved by the court of appeals in the very decision petitioner asks this Court to review. As the court of appeals noted, Pet. App. A6, n. 7, the earlier Ninth Circuit decision in *Norman v. McKee*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971), stood for the proposition that the issue of whether a consent decree should be approved was itself "a collateral issue completely distinct from the merits of the case," *id.*, and thus appealable of right under section 1291. Other appellate courts had declined to follow the *Norman* lead, however, *see, e.g., Seigal v. Merrick*, 590 F.2d 35 (2d Cir. 1978) (district court's refusal to approve stipulation of settlement not appealable under 28 U.S.C. § 1291) and *State of New York v. Dairylea Cooperative, Inc.*, 698 F.2d 567 (2d Cir. 1983) (refusal to approve decree not automatically appealable under 28 U.S.C. § 1292(a)(1)), and more recent Ninth Circuit decisions have recognized this Court's limitations of the "collateral order" doctrine. *In re Benny*, 791 F.2d 712, 719 (9th Cir. 1986), *Eluska v. Andrus*, 587 F.2d 996, 1000 (9th Cir. 1978). *Carson* clearly establishes that not all refusals to approve consent decrees are appealable, and to that extent implicitly rejects the contrary rule which *Norman* had seemed to represent. In overruling *Norman* therefore, the court of appeals has done no more than to recognize the analytical conflict between *Norman* and *Carson*, and to correct Ninth Circuit decisional law on the subject accordingly. In sum, the decision below does not represent a conflict over the correct construction either of 28 U.S.C. § 1291 or 28 U.S.C. § 1292(a)(1).

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court of appeals, or in its opening brief in that court. *See* Rule 13(b)(1)(C) of the Rules of the Court of Appeals for the Ninth Circuit.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

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No. 86-525

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

AND RELATED CROSS AND THIRD PARTY ACTIONS.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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No. 86-525

IN THE SUPREME COURT

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OCTOBER TERM, 1986

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner Pan American World Airways, Inc. ("Pan Am") filed the Petition

for Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit that it lacked jurisdiction over Pan Am's appeal from an order refusing to enter a consent decree that would have settled an employment discrimination action. Pan Am contends that the order was appealable under 28 U S.C. § 1292(a)(1) as a denial of injunctive relief or, in the alternative, under 28 U.S.C. § 1291 as a "collateral order."

Pursuant to Supreme Court Rule 22.5, Pan Am files this Reply Brief in Support of the Petition for Writ of Certiorari to respond to two issues raised in the Opposition of Former Pan American Pilots/Claimants to Petition for Writ of Certiorari

("Pilots/Claimants Br.") and one issue raised in the Brief of the NAL Chapter, Flight Engineers International Association, in Opposition ("NAL Br.").[1] First, citing no authority, Claimants assert that "this case presents an occasion in which interlocutory appellate review is not likely to lead to a different result." Pilots/Claimants Br. p. 32 (emphasis in original). Second, the NAL flight engineers argue that the Ninth Circuit rule, which allows plaintiffs and not

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1 The district court granted Claimants and the NAL flight engineers leave to intervene for the limited purpose of objecting to the terms of the consent decree. Petition for Writ of Certiorari A-30-33. The Equal Employment Opportunity Commission, Pan Am, and the collective bargaining representatives of the affected employees are the only true parties to this action.

defendants to appeal the same order, is justified by the fact that employment discrimination statutes do not protect employer defendants. Finally, Claimants contend that the petition for writ of certiorari fails to raise a recurring question of federal law. Pan Am respectfully submits that such contentions are in error.

I. If the Court of Appeals had Exercised Jurisdiction Over the Appeal, It Might Well Have Concluded that the District Court Erred in Refusing to Enter the Consent Decree.

Claimants erroneously claim that, even if the Ninth Circuit exercised appellate jurisdiction, the result would not change. Pan Am contends that the

District Court should have deferred to the Equal Employment Opportunity Commission's ("EEOC") exercise of the discretion delegated by Congress in the Age Discrimination in Employment Act ("ADEA") to settle this action. See Petition for Writ of Certiorari p. 7 n.8. That position is supported by the language and enforcement scheme of the ADEA and the only authority on point.

The EEOC may bring actions to enforce the ADEA. See 29 U.S.C. § 626. In bringing ADEA enforcement actions, the EEOC, as a federal agency, represents both the public interest and the affected employees. In view of that dual role, the EEOC and the employees almost inevitably have somewhat divergent interests in settling a dispute. The ADEA's enforcement scheme copes with

that potential problem by vesting sole discretion in the EEOC to settle a lawsuit that it has brought.

Section 7(c)(1) of the ADEA, 29 U.S.C. § 626(c)(1), provides that:

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter. (emphasis added).

Section 7's limitation on private rights "manifests a congressional intent to place the EEOC's conduct of ADEA enforcement proceedings beyond the interference of private non-party individuals . . . ."

EEOC v. Consolidated Edison Co.,
557 F. Supp. 468, 471 (S.D.N.Y. 1983).[2]

Because the ADEA places the exclusive authority to litigate a case in the hands of the EEOC, the district court should have deferred to the EEOC's reasoned decision to settle its action against Pan Am. The only two courts that have confronted the question have adopted this position.

In EEOC v. Consolidated Edison Co., 557 F. Supp. 468 (S.D.N.Y. 1983), the court held that employees could not object to the terms of a consent decree settling an ADEA

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2 See also H.R. Rep. No. 805, 90th Cong., 1st. Sess. (1967), reprinted in 1967 U.S. Code Cong. & Admin. News 2213, 2218 (stating that Section 7 is designed to enable the EEOC "to discharge [its] responsibilities to achieve to the optimum the purposes of the act . . . .").

action brought by the EEOC against Consolidated Edison. The court emphasized that

> [t]his suit is not a class action nor does it fall within any other of the limited categories of cases in which a Court is called upon to determine the fairness or desirability of a proposed settlement. In approving this settlement, this Court merely acknowledges that the parties have exercised the right, which they have, to discontinue this litigation.

557 F. Supp. at 470 (emphasis added).

Similarly, the court in EEOC v. Eastern Air Lines, Inc., 97 F.R.D. 646 (S.D. Fla. 1983), appeal dismissed, 736 F.2d 635 (11th Cir. 1984), rejected the argument that the EEOC failed adequately to protect the interests of claimants in negotiating a consent decree with Eastern Air Lines and denied the claimants' motion

to intervene. The court allowed the parties to the action -- Eastern Air Lines and the EEOC -- to settle the lawsuit on mutually agreeable terms.[3]

Both Consolidated Edison and Eastern Air Lines stand for the proposition that, after the EEOC has filed an ADEA action, the individuals on whose behalf the EEOC brought the suit have no legal right to preclude consummation of a settlement. Claimants cryptically challenge the authority of these cases. See Pilots/Claimants Br. p. 35 n.10. However,

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3 In reviewing the ADEA's enforcement scheme, the court emphasized that "[e]vidently, regardless how substantial the interest of any single litigant, that interest must yield to the larger interest served by EEOC when it proceeds on behalf of that litigant." 97 F.R.D at 649.

in the court below, Claimants failed to cite even one case under the ADEA that is contrary to Consolidated Edison or Eastern Air Lines and relied exclusively on cases applying the fairness standard of Fed. R. Civ. P. 23(e) in reviewing class action settlements.

In this case, the district court subjected the monetary settlement reached by Pan Am and the EEOC to a strict Rule 23 fairness standard -- a standard that is inconsistent with the enforcement scheme of the ADEA and Consolidated Edison and Eastern Air Lines. Because it had jurisdiction under 28 U.S.C. §§ 1291, 1292, the Ninth Circuit should have decided whether the district court erred in doing so. In short, appellate review might well lead to

a different result -- entry of the consent decree settling this action.

II. Defendants, as well as Plaintiffs, Should Be Permitted to Appeal an Order Refusing to Enter a Consent Decree.

In this case, the Ninth Circuit expressly held that Carson v. American Brands, Inc., 450 U.S. 79 (1981), applies only when plaintiffs appeal from denial of a joint motion to enter a consent decree containing injunctive relief. The NAL flight engineers attempt to justify the rule that plaintiffs but not defendants can appeal the same order on the grounds that employment discrimination statutes protect plaintiff employees and not defendant employers. NAL Br. pp. 6-7. However,

voluntary settlement of employment discrimination actions is in the interest of employers as well as employees.[4] The fact that the ADEA prohibits certain types of age discrimination by employers and labor organizations against employees does not change this fundamental policy. By allowing plaintiffs but not defendants to appeal a district court order refusing to

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4 Claimants' suggestion that there is no policy favoring voluntary settlement of ADEA actions, Pilots/Claimants Br. pp. 33-35, is puzzling. To avoid the waste of judicial and private resources, settlement is favored over litigation. Any argument to the contrary is nonsensical. Moreover, by requiring the EEOC to resolve alleged violations of the ADEA by "informal methods," 29 U.S.C. § 626(a), the statute demonstrates the congressional intent to facilitate settlement of ADEA actions.

enter their jointly proposed consent decree, the Ninth Circuit's decision is contrary to the policy favoring voluntary settlement. In short, there is no justification for a rule that allows plaintiffs but not defendants to appeal the same order.

III. The Petition for Writ of Certiorari Raises a Recurring Question of Law.

In contending that this Court should deny the petition for writ of certiorari, the Claimants boldly assert that "[t]he instant case presents an unusual non-recurring situation." Pilots/Claimants Br. p. 26.[5] However, the issue presented to

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5 The NAL flight engineers also contend that the jurisdictional question is not a recurring one. NAL Br. p.10.

this Court almost certainly will arise again and will have a direct impact on numerous actions in the future. Moreover, defendants seeking to settle actions will be at a serious disadvantage in settling actions in the future if the Ninth Circuit's decision is allowed to stand.

Because the Ninth Circuit rule allows only plaintiffs to appeal from denial of a joint motion to enter a consent decree, whenever a district court finds that the monetary portion of a consent decree is inadequate, plaintiff will lack incentive to appeal that order. Plaintiff instead can utilize the district court's disapproval of the consent decree as a lever and seek a larger monetary award from defendant in subsequent negotiations. Defendant,

under the rule enunciated by the Ninth Circuit, cannot appeal and is left no alternative but to pay more money or proceed to trial. Defendants therefore will no doubt repeatedly be placed in this disadvantaged position by plaintiffs.

In short, the jurisdictional question raised by Pan Am is a significant legal question and is likely to recur; despite the suggestion of Claimants, it is not one of merely academic interest.[6] Moreover,

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6 Furthermore, the NAL flight engineers' suggestion that Pan Am somehow "waived" the right to argue that appellate jurisdiction is proper under Section 1291 is erroneous. Contrary to the NAL flight engineers' statement, NAL Br. pp. 10-11 n.7, the collateral order doctrine was asserted as a basis for jurisdiction in the docketing statement submitted by Pan Am with the Ninth Circuit. In addition, the question whether

(footnote continued)

the practical effects of the Ninth Circuit's decision directly affects Pan Am's ability to settle this case with the EEOC. Accordingly, this Court should grant the petition for writ of certiorari. See Sup. Ct. R. 17.1(a).

(footnote continued from previous page) jurisdiction was appropriate under that section was briefed by the parties. In any event, even if the parties failed to raise the issue, the Ninth Circuit was obligated to determine whether, and on what basis, it had jurisdiction over the appeal. See Mansfield, Coldwater & Lake Michigan Ry. v. Swan, 111 U.S. 379 (1884); Capron v. Van Noorden, 6 U.S. (2 Cranch.) 125 (1804). Here, the Ninth Circuit expressly held that it lacked jurisdiction over the appeal under Section 1291. Petition for

CONCLUSION

For the foregoing reasons and those set forth in the Petition for Writ of Certiorari, petitioner Pan American World Airways, Inc. respectfully requests that this Court grant the petition for writ of certiorari.

Dated: November 6, 1986

Respectfully submitted,

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No. 86-525

In the Supreme Court of the United States

OCTOBER TERM, 1986

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

Petitioner, the defendant in an age discrimination lawsuit, contends that the court of appeals had jurisdiction to entertain its challenge to the district court's rejection of a proposed consent decree.

1. In 1981, the Equal Employment Opportunity Commission (EEOC) brought this action against petitioner, alleging that its employment practices violated the Age Discrimination in Employment Act of 1967 (ADEA or Act), 29 U.S.C. (& Supp. II) 621 *et seq.* In particular, the EEOC challenged petitioner's policies mandating that pilots retire at age 60 rather than displace less senior flight engineers, and preventing pilots who previously had "downbid" to flight engineer positions from serving past age 60. Pet. App. A2 & n.1, A10. The EEOC sought both injunctive relief and back pay. Petitioner in turn brought actions against the unions representing the affected employees, the Airline Pilots Association (ALPA) and the Flight Engineers International Association (FEIA), so that they would be bound in the event that resolution of the case required modification of petitioner's collective bargaining agreements. *Id.* at A2.

In 1983, petitioner and the EEOC entered into a proposed consent decree. The decree required petitioner to modify its employment practices: it obligated petitioner to allow flight engineers to work until age 70 and to permit pilots reaching age 60 to "bump" more junior flight engineers. The agreement also provided for monetary relief for pilots who previously had been forcibly retired at age 60 and did not desire to return and retrain as flight engineers. Pet. App. A2. The district court refused to enter the decree, however, choosing to await this Court's then-pending decision in *Trans World Airlines, Inc.* v. *Thurston* (*TWA*), 469 U.S. 111 (1985), which it expected to clarify the law in this area (see Pet. App. A2-A3). Following this Court's decision in *TWA*, petitioner and the EEOC entered into a modified consent decree.[1] This second decree provided for essentially the same injunctive relief as that offered in the first settlement, but increased the monetary relief to be provided by petitioner. *Id.* at A3, A13-A14.

On October 21, 1985, the district court refused to approve the modified decree (Pet. App. A8-A34). In reviewing the decree, the court "use[d] the standard of fairness, adequacy, and reasonableness" (*id.* at A19). This standard, the court explained, "involves balancing several factors including the strength of plaintiff's case; the risk of continued litigation; the presence of a government participant; and the amount offered in settlement" (*id.* at A20).

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[1] Petitioner appealed the district court's disapproval of the first settlement; while the EEOC took the position that the court of appeals had jurisdiction to entertain the appeal under both 28 U.S.C. 1291 and 1292(a)(1) (see Memorandum of EEOC in Opposition to Motion to Dismiss Appeal 3-11), the EEOC declined to join in that appeal because it believed that the case would be resolved more expeditiously by proceeding immediately to trial (see Pet. App. A16). After this Court's decision in *TWA*, petitioner asked the court of appeals to remand the case to permit modification of the decree. The court granted this request. See *id.* at A3.

Applying this standard, the court found the monetary relief provided by the decree to be inadequate. The court noted that "[c]laimants could potentially recover much more than the Decree presently provides" (Pet. App. A22).[2] The fairness of the $1.5 million provided by the decree thus "turn[ed] on the strength of claimants' underlying claim" (*id.* at A24). The court found that claim directly supported by *TWA*, noting that "[i]n many ways, TWA treated its age 60 pilots more evenhandedly than [petitioner] did" (*id.* at A25; see *id.* at A24-A27). The court also found it unlikely that petitioner would be able to make out a bona fide occupational qualification defense (*id.* at A29). In all, the court found the claimants' likelihood of success high; it therefore held that "[t]he settlement agreement offers claimants inadequate compensation for their years of involuntary retirement" (*id.* at A34).

2. On petitioner's appeal, the court of appeals held that it lacked jurisdiction to entertain petitioner's challenge to the district court's decision (Pet. App. A1-A7).[3] The court explained that, under *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981), an order denying a joint motion for entry of a consent decree is appealable under 28 U.S.C. 1292(a)(1) if three conditions are met: "First, the interlocutory order must have the practical effect of denying an injunction. Second, the order must have 'serious, perhaps irreparable, consequence[s].' Finally, the order must be one that can be 'effectively challenged' only by immediate appeal." Pet. App. A4 (citations omitted).

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[2] The court noted that petitioner's potential liability for back pay through August 1985 amounted to more than $26 million, exclusive of interest, and that petitioner also might be liable for front pay and penalties (Pet. App. A22-A23).

[3] The EEOC did not appeal, taking the position that the district court did not abuse its discretion in refusing to accept the settlement (EEOC C.A. Br. 8-18).

The court held that the appeal here failed to satisfy the first two of these requirements. It reasoned that petitioner had not been denied an injunction because, "[a]lthough the disapproved consent decree clearly involved injunctive relief (primarily the modification of [petitioner's] cockpit staffing policies), that injunctive relief was sought by the *appellee* EEOC, not by [petitioner]" (Pet. App. A4 (emphasis in original)). While the court recognized that the decree would have granted petitioner a sort of injunctive relief by modifying petitioner's collective bargaining agreements to comport with the relief awarded the EEOC, the court explained that "the amendments to the collective bargaining agreement * * * are a kind of 'secondary' injunctive relief, made necessary only by the relief granted to the EEOC and *against* [petitioner]" (*id.* at A5 (emphasis in original)).

The court also held that petitioner had not satisfied the second prong of the *Carson* test—requiring that the challenged order have serious or irreparable consequences—because it did not deny petitioner the opportunity "to settle the case on *any* mutually agreeable terms * * *; [petitioner] is merely being denied the right to settle the case on the *particular* terms of the current proposed consent decree" (Pet. App. A6 (emphasis in original)).

The court of appeals also held that petitioner could not ground its appeal on 28 U.S.C. 1291. It acknowledged that Ninth Circuit precedent permitted defendants to proceed under that provision in challenging orders disapproving consent decrees. Pet. App. A6 n.7 (citing *Norman* v. *McKee*, 431 F.2d 769, 772-774 (9th Cir. 1970), cert. denied, 401 U.S. 912 (1971)). But the court noted that *Carson* explicitly resolved a circuit conflict concerning the appealability of interlocutory orders disapproving consent decrees, and cited *Norman* as one of the conflicting cases. The court therefore concluded that "*Carson* was clearly in-

tended to provide a definitive basis and standard for such interlocutory appeals, and thus overrules *Norman* v. *McKee*'s reliance on section 1291" (Pet. App. A7 n.7).

3. a. Whether a *defendant* may proceed under 28 U.S.C. 1292(a)(1) in challenging a district court's refusal to enter a consent decree is a close question that is not directly controlled by *Carson*, which involved a plaintiff's appeal from such a ruling. Several factors support the court of appeals' holding that such an appeal is improper. The usual rule is that Section 1292(a)(1)—which grants the courts of appeals jurisdiction over appeals from interlocutory orders "refusing * * * injunctions"—authorizes an appeal only by the plaintiff, the party that seeks and is "refus[ed]" the injunction. See *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 744-745 (1976). Here, the EEOC brought suit; it was the EEOC, rather than petitioner, that sought injunctive relief and that was effectively denied that relief when the district court refused to enter the consent decree. See *Carson*, 450 U.S. at 83-84.

On the other hand, the *Wetzel* rule may not be fully applicable in the consent decree context. Defendants, of course, usually oppose the award of injunctive relief. When the defendant enters into a consent agreement, however, it is inviting the imposition of an injunction, both as the condition upon which the litigation will be terminated and to insulate its actions from further challenge. In that setting, it is at least arguable that the district court's refusal to approve the consent agreement involves the "denial of an[] injunction sought by" the defendant. *Wetzel*, 424 U.S. at 745.

It also is a close question whether petitioner's appeal satisfies the second, "irreparable injury" prong of the *Carson* standard. There is language in *Carson* suggesting that a party suffers such injury whenever it "lose[s] [its] opportunity to settle the case on the negotiated terms."

450 U.S. at 86. Petitioner certainly has suffered such a loss. At the same time, however, the Court emphasized that the district court in *Carson* had rejected the settlement agreement because it believed that no race-conscious injunctive relief could be awarded on the facts presented, given the failure to show present or past discrimination (*id.* at 82).[4] The district court accordingly had "ordered the parties to proceed to trial and to have their respective rights and liabilities established within limits laid down by that court." *Id.* at 87 (footnote omitted); see *id.* at 87 n.12. In contrast, as the court of appeals explained, in this case "the district court's ground for disapproving the decree is not nearly so broad," and "in no way inhibits further negotiations between the EEOC and [petitioner] to meet the concerns raised" (Pet. App. A6). Petitioner thus has not been entirely deprived of its opportunity to settle the case.[5]

While the applicability of Section 1292(a)(1) when the defendant appeals the disapproval of a consent decree thus involves difficult questions, those questions do not, in our view, require consideration by the Court at this time. The

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[4] The district court further held that even such a showing would justify race-conscious relief only for the benefit of persons who were themselves the victims of discrimination. 450 U.S. at 82.

[5] Moreover, *Carson* presented a second form of irreparable injury that has not been suffered by petitioners here—the denial of immediate injunctive relief to plaintiffs who were forced to work in a discriminatory setting. See 450 U.S. at 89 & n.16. The same sort of injury was inflicted by the district court's disapproval of a consent agreement in *Donovan* v. *Robbins*, 752 F.2d 1170 (7th Cir. 1985), upon which petitioner relies (Pet. 14). In that case, which involved a suit to correct the mismanagement of pension funds, the court of appeals found an appeal (by both the plaintiff and the defendants) proper because the district court's decision meant that "[t]he coming into effect of equitable provisions designed to protect the pension rights of thousands of workers would be delayed for a long time—perhaps forever." 752 F.2d at 1176.

decision below is the first post-*Carson* ruling to consider the issue.[6] And the question is unlikely to arise often. In many cases, both parties—who freely chose to enter into the settlement agreement after assessing the strengths of their respective litigation positions (see generally *Carson*, 450 U.S. at 86-87)—will have an interest in pursuing an appeal. Because appellate jurisdiction will exist whenever the plaintiff takes an appeal, it will be irrelevant whether the defendant could have proceeded on its own under Section 1292(a)(1). In these circumstances, there is no need for the Court to review a decision providing a plausible answer to a novel legal question.

b. The correctness of the holding below that the district court's order cannot be challenged on appeal under 28 U.S.C. 1291 also is open to dispute. As this Court recently explained, a district court's ruling may be appealed as a collateral order under the doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), if it satisfies three conditions: "It must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.' " *Richardson-Merrell, Inc.* v. *Koller*, No. 84-127 (June 17, 1985), slip op. 6 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). The district court's order here may satisfy all of these conditions.

There is little doubt that the district court's disapproval of the consent decree "conclusively determine[d] the disputed question"—whether the case would be settled on the negotiated terms. There was nothing "inherently tentative" about the order (*Coopers & Lybrand*, 437 U.S. at

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[6] The only pre-*Carson* decision permitting a defendant to appeal the disapproval of a plea agreement appears to be *In re International House of Pancakes Franchise Litigation*, 487 F.2d 303 (8th Cir. 1973). And that decision, as this Court has noted, contained "no discussion of [the] jurisdictional question." *Carson*, 450 U.S. at 83 n.6.

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469 n.11); the district court made it plain that it would not approve the decree without a substantial modification of the monetary relief (see Pet. App. A34). Compare *Coopers & Lybrand*, 437 U.S. at 469 & n.11. It is also arguable that the issue resolved in the challenged order should be viewed as separate from the merits: while "[c]ourts judge the fairness of a proposed [settlement agreement] by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement," they "do not decide the merits of the case or resolve unsettled legal questions." *Carson*, 450 U.S. at 88 n.14.[7] And as this Court has noted, refusal to accept a settlement cannot be reviewed effectively after a trial on the merits (*ibid.*).

Given these considerations, the Ninth Circuit, prior to its decision in this case, had held that a district court's refusal to approve a settlement is appealable under Section 1291. *Norman* v. *McKee, supra.* The court below departed from this approach only because it concluded that *Norman* had been effectively overruled by this Court's decision in *Carson* (Pet. App. A7 n.7). But the correctness of this conclusion is open to dispute, since *Carson* itself expressly declined to decide whether Section 1291 is applicable in such circumstances. 450 U.S. at 83 n.7.

Again, however, in our view the question of the applicability of Section 1291 to the order here does not warrant consideration by the Court. Whether or not the court of appeals was correct in its reading of *Carson*, the court's refusal to follow *Norman* eliminated a conflict in the circuits on the appealability under Section 1291 of orders disapproving settlement agreements. See *Seigal* v.

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[7] It undoubtedly is true, however, that the district court's analysis of a proposed settlement involves consideration of the merits of the plaintiff's claim. Compare *Coopers & Lybrand*, 437 U.S. at 469 & n.12.

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Merrick, 590 F.2d 35 (2d Cir. 1978) (holding such orders not appealable under Section 1291). And after this Court's decision in *Carson*, the issue is unlikely to arise with any frequency because, as we note above, plaintiffs may routinely challenge such orders under Section 1292(a)(1). The correctness of the court of appeals' resolution of this narrow issue accordingly is not the sort of question that requires resolution by this Court, at least in the absence of a conflict in the circuits.

c. An additional prudential consideration also counsels against the Court's review of the decision below. Given this Court's decisions in *TWA* and *Western Air Lines, Inc.* v. *Criswell*, No. 83-1545 (June 17, 1985),[8] we cannot say that the district court abused its discretion in holding that the settlement agreement undervalued the strength of the discrimination claim.[9] The court of appeals therefore could be expected to affirm the district court's ruling were it to reach the merits of petitioner's appeal. Because "[t]he need for quick dispute resolution is acute in the ADEA context" (*Gabriele* v. *Chrysler Corp.*, 573 F.2d 949, 954 (6th Cir. 1978)), the likelihood that petitioner could not ultimately prevail militates against review in this case, even if the jurisdictional issue presented by petitioner otherwise warranted the Court's consideration.

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[8] In *TWA*, the Court held that the ADEA was violated by an airline policy that made it impossible for certain pilots to become flight engineers after turning 60. In *Criswell*, the Court rejected a claim that an airline policy forcing flight engineers to retire at age 60 established a bona fide occupational qualification.

[9] We do not understand ~~that~~ this Court's opinion in *Local 93, Firefighters* v. *City of Cleveland*, No. 84-1999 (July 2, 1986), which discusses the "dual character" of consent decrees as contracts and judicial decrees and holds that they are not encompassed within the term "order[s] of the court" as used in Section 706(g) of Title VII (slip op. 16-21), to alter in any way the standards under which district courts are to review consent decrees.

It is therefore respectively submitted that the petition for a writ of certiorari should be denied.

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